SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 313.

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

WESLEY L. SISCHO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

1 Names and addresses of counsel.

Robt. C. Saunders, Esq., attorney for plaintiff in error 310 Federal Building, Seattle, Washington.

F. R. Conway, Esq., attorney for plaintiff in error, 310 Federal Building, Seattle, Washington.

Daniel Landon, Esq., attorney for defendant in error, 1054 Empire Building, Seattle, Washington.

No. 4038.

Complaint.

Comes now the United States of America by Ben L. Moore, United States attorney, and Donald A. McDonald, assistant United States attorney, and for cause of action against the defendant, Wesley L. Sischo, complains and alleges:

First: That in violation of Section 3089, Revised Statutes of the United States, said defendant, Wesley L. Sischo, did heretofore on the 7th day of December, 1917, the said Wesley L. Sischo, being master of and in charge of the gasoline launch "Nellie Evelyn," and which said launch "Nellie Evelyn" was owned and operated by W. L. Sischo, who was privy and consenting to the matters hereinafter mentioned, upon and across the waters of Puget Sound, Admiralty Inlet, San Juan Straits and the Gulf of Georgia,

2 for the purpose of carrying and bringing into the United States from divers and sundry places in the Dominion of Canada certain merchandise denied importation into the United States, to wit, one hundred (100) five-tael tins of opium.

Second: That the said Wesley L. Sischo did on the 7th day of December, A. D. 1917, come from said foreign territory adjacent to the United States, to wit, the Province of British Columbia, Dominion of Canada, into and arrive within the customs district of the Western District of Washington in the United States, the said boat being then and there laden with, and bringing and importing into the said Western District certain merchandise hereinafter referred to, to wit, one hundred (100) five-tael tins of opium, prepared for smoking purposes, the same not being on any manifest, or included or described in the manifest, and the said defendant did neglect and refuse to deliver the manifest of the cargo and lading of said boat, as required by law, at the office of the collector of customs or deputy collector of customs at Blaine, Bellingham, Anacortes, Friday Harbor or Roche Harbor, or at any custom-house or office of the collector or deputy collector being located at each of said places, or either or any of them, said customs-house being nearest said boundary line between said province of British Columbia and the United States of America, and nearest to the waters by when said merchandise was brought into the

United States, each and all of the said customs-houses being nearest to the said international boundary than the place of seiz-
3 ure of said vessel, and that the said W. L. Sischo, having charge of the said boat as aforesaid, did pass by and avoid each of the said customs-houses and did neglect and refuse to deliver said manifest as required by law.

Third: Plaintiff further alleges that the value of the said merchandise was the sum of six thousand four hundred dollars ($6,400).

Fourth: That in accordance with the provisions of section 2809 of the Revised Statutes of the United States, the collector of customs has heretofore imposed a penalty in the sum of six thousand four hundred ($6,400) dollars against the said Wesley L. Sischo.

Fifth: That the said defendant has failed and refused to pay said sum, although demand has been made therefor, and that he still fails and refuses to pay the same.

Sixth: Plaintiff further alleges that by reason of the violation of the said act of Congress, as aforesaid, defendant is liable to the United States of America to a penalty in the sum of six thousand four hundred ($6,400) dollars.

Wherefore plaintiff prays judgment against the said defendant in the said sum of six thousand four hundred ($6,400) dollars and the costs incurred in this action.

BEN L. MOORE,
United States Attorney.
DONALD A. MCDONALD,
Assistant United States Attorney.

4 THE UNITED STATES OF AMERICA,
Western District of Washington, Northern Division, ss.

Donald A. McDonald, being first duly sworn, on oath deposes and says: That he is assistant United States attorney for the Western District of Washington, and makes this verification for and on behalf of the plaintiff; that he has read the foregoing information, knows the contents thereof, and the same is true as he verily believes.

DONALD A. MCDONALD.

Subscribed and sworn to before me this 29th day of April, 1918.

[SEAL.] ED M. LAKIN,
Deputy Clerk, U. S. District Court,
Western District of Washington.

[Indorsed:] Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 29, 1918. Frank L. Crosby, clerk. By Ed M. Lakin, deputy.

No. 4038.

Appearance of counsel for defendant.

To the clerk of the above-entitled court:

You will please enter my appearance as attorney for defendant in the above-entitled cause, and service of all subsequent papers,
5 except writs and process, may be made upon said attorney, by leaving the same with Daniel Landon.

Office address:

———— ————.

Notice: Attorneys will please endorse their own filings, Rule 11.

[Indorsed:] Appearance. Filed in the U. S. District Court, Western District of Washington, Northern Division. June 18, 1918. Frank L. Crosby, clerk. By Ed. M. Lakin, deputy.

No. 4038.

Answer.

Comes now the defendant above named and in answer to plaintiff's complaint, admits, alleges, and denies:

I.

Denies each and every allegation contained in paragraph I of said complaint.

II

Denies each and every allegation contained in paragraph II of said complaint.

III

Denies each and every allegation contained in paragraph III of said complaint, and especially denies that the so-called merchandise was worth the sum of sixty-four hundred ($6,400.00) dollars, or any sum whatever.

IV.

Denies each and every allegation contained in paragraph IV of said complaint.

6

V.

Denies each and every allegation contained in paragraph V of said complaint.

VI.

Denies each and every allegation contained in paragraph VI of said complaint, and especially denies that the penalty should be in

the sum of sixty-four hundred ($6,400.00) dollars, or any sum whatever.

Wherefore, defendant prays that the action be dismissed, with costs to plaintiff.

DANIEL LANDON,
Attorney for Defendant.

[Indorsed:] Answer. Filed in the U. S. District Court, Western District of Washington, Northern Division. June 18, 1918. Frank L. Crosby, clerk. By Ed. M. Lakin, deputy.

No. 4038.

Trial to court.

Now on this day this cause comes on for trial before the court, Ben L. Moore appearing for the plaintiff and Daniel Landon for the defendant. Both sides being ready, it is stipulated in open court that a jury be waived, and it is so ordered. Opening statement is made by the plaintiff. Witnesses Ben Litchenberg, A. B. Hamer, Henry Blackwood and Ray W. Clough are sworn and examined and Exhibit No. 1 introduced. Plaintiff and defendant rest.
7 Brief of plaintiff is to be filed by December 7th and defendant's brief three days later.

Dated December 3, 1918.
Journal 7, page 180.

No. 4038.

Decision on the merits.

Filed November 22, 1919.

Robert C. Saunders, United States attorney, Charlotte Kolmitz, assistant United States attorney, for plaintiff.
Daniel Landon, for defendant.

CUSHMAN, District Judge:

The defendant, Wesley L. Sischo, was tried for a violation of the act of February 9, 1909, as amended January 17, 1914 (sec. 8801, Comp. St. 1918); convicted, sentenced, and is now serving a term of years in the penitentiary for smuggling opium prepared for smoking from British Columbia into the United States. The opium and the boat in which it was smuggled have been forfeited. The customs department, under sec. 2809, R. S. (see 5506, Comp. St. 1918), imposed a penalty of $6,400 upon the defendant and this suit was begun under section 15 of the act of June 22, 1874 (sec. 5803, Comp. St. 1918), upon the report of the collector, and a writ of attachment issued against a Marmon automobile, the property of this defendant, to satisfy the said penalty.

8 The complaint, or libel of the Government describes the importation as "certain merchandise denied importation into the United States, to wit, one hundred (100) five-tael tins of opium, prepared for smoking purposes, the same not being on any manifest or included or described in the manifest," and alleges that the value of such merchandise was $6,400.

The answer of the defendant denies the allegations of the libel and specifically denies that the so-called merchandise was worth the sum of $6,400, or any sum whatever.

A trial has been had, upon which the Government produced testimony regarding the value, in this country, of morphine and showed that the opium brought in by Sischo could be converted into morphine. There was no evidence as to the cost of such conversion. Other testimony was introduced as to what price was paid in British Columbia for such opium.

The laws of British Columbia, as our own, prohibit any importation or traffic in such opium.

Further testimony was given regarding the price paid for opium in China, Mexico and Macao, a Portugese colony near China.

Sec. 2809, R. S. (2 Fed. St. Ann. 647), sec. 5506, Comp. St. of 1916 and 1918), provides:

"If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be

9 liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers or crew of such vessel shall be forfeited.

This section is contained in the customs revenue act of March 2, 1799 (sec. 24, 1 Stat. 646).

"The word 'merchandise,' as used in this title, may include goods, wares, and chattels of every description capable of being imported." (Sec. 2766, R. S., sec. 5462, Comp. St. 1916 and 1918.)

Section 15 of the act of June 22, 1874 (an act entitled "An act to amend the customs revenue laws and to repeal moieties"), provides:

"That it shall be the duty of any officer or person employed in the customs revenue service of the United States, upon detection of any violation of the customs laws, forthwith to make complaint thereof to the collector of the district, whose duty it shall be promptly to report the same to the district attorney of the district in which such frauds shall be committed. Immediately upon the receipt of such complaint, if, in his judgment, it can be sustained, it shall be the duty of such district attorney to cause investigation into the facts to be made before a United States commissioner having jurisdiction thereof, and to initiate proper proceedings to recover the fines and penalties in the premises, and to prosecute

10 the same with the utmost diligence to final judgment." (13 St. at L. 189; sec. 5803, Compiled St. 1916 and 1918.)

The statutes further provide:

"After the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, That opium and preparations and derivatives thereof, other than smoking opium, or opium prepared for smoking, may be imported for medicinal purposes, only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law." (Sec. 8800, Comp. Stat. 1918.)

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed and the offender shall be fined in any sum not exceeding $5,000 nor less than $50 or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is

11 shown to have, or to have had possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury." (Sec. 8801, Comp. Stat. 1918.)

"Whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes." (Sec. 8801f, Comp. St. of 1918.)

A tax of $300 per pound is levied upon opium manfactured in the United States for smoking purposes, and a minimum bond of $100,000 is required of the manufacturer (secs. 6287A and 6287B, Comp. St. of 1916 and 1918); but all opium prepared for smoking is denied importation. (Secs. 8800 and 8801, Comp. St. of 1918.)

Sec. 4 of the act of June 22, 1874 (sec. 5798, Comp. St. of 1916 and 1918), defines smuggling as

"* * * The act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or

12 the package containing the same, through the customs-house, or submitting them to the officers of the revenue for examination."

To justify a judgment for the penalty for which suit is brought, three things are necessary:

1st. That section 2809, R. S., was intended to cover prohibited articles—things denied admission to the United States, as well as legitimate articles of commerce brought into the United States in an unauthorized manner, that is, not manifested as required by law;

2d. That imported opium prepared for smoking purposes falls within the description of "goods, wares or merchandise," as the same are used in customs-duty laws and section 2809, R. S.;

3d. That such opium is an article of merchandise of value and that the value has been shown.

The decisions as to the rule of construction of provisions for forfeiture and penalties are not in accord. Certain courts have held that they are highly penal; others hold them remedial in character; but, even by the latter class, as well as the former, the case must be brought, not only within the letter, but the spirit of the statute. (12 Cyc. 1166B and 1167.)

If the present case is not fairly within the provisions of section 2809, R. S., no cause arises for stretching that statute to cover it as an overlooked need. It is not casus omissus, for sec. 3082, R. S. (sec. 5785, Comp. St. 1916 and 1918), the general smuggling statute, and sec. 8801 (Comp. St. 1918), the opium smuggling statute, being the statute under which the defendant was convicted, make
13 provision, not only for imprisonment and fine, but forfeiture as well.

Customs laws pertain to that part of commerce that has to do with property, its exchanges and movements. "Customs duties" is the name given to taxes on the importation and exportation of commodities (Webster's Dictionary); the tariff or tax assessed upon merchandise imported from, or exported to a foreign country. (Standard Dictionary.)

What is condemned by sec. 2809, R. S., is non-manifested merchandise. Webster defines "merchandise" as "whatever is usually bought or sold in trade or market or by a merchant."

"Commodity" is defined as an article of trade, a movable article of value, something that is bought and sold. (Standard Dictionary.)

"Merchandise" is anything customarily bought and sold for profit. (Standard Dictionary.)

"Capable," Webster gives as synonyms: Susceptible, competent, qualified, fitting, possessing legal power or capacity.

The word "chattels" is derived from the Norman-French, its meaning being goods of every kind, every specie of property movable, which is less than freehold. (Bouvier's 3d ed., vol. 1, p. 471.)

If "capable of being imported" referred to, and was limited to physically capable, Congress would have contented itself with saying personal chattels, for it would be ridiculous to think that Congress would have thought it necessary to exclude the impossible—the importation of chattels real.

14 Opium lawfully brought into the United States is merchandise; but it does not, necessarily, follow that smoking opium, denied admission to the United States, is merchandise, considered either generally, or as the word is used in section 2809, R. S.

The rule of construction noscitur a sociis is particularly applicable and frequently resorted to in interpreting custom statutes. "Merchandise, goods, wares and chattels" are not used in an all comprehensive sense so as to include all movable things. These words, as used in this statute, do not include ships, themselves. (12 Cyc. 1132 (11); The Conqueror, 166 U. S. 110.)

The words "chattels capable of being imported," being used with the words "goods and wares," under the rule noscitur a sociis, would limit their meaning to articles the subject of commercial transactions—lawfully the subject of such transactions. All laws regulating the payment of duties are, for practical application to commercial operations, to be considered in a commercial sense.

Merchandise may include every article of traffic, foreign and domestic, which is properly embraced in a commercial transaction, but it would not include imported slaves, although they were merchandise in a foreign state. (Groves v. Slaughter, 40 U. S. (15 Peters) 449, at 506 and 507.)

The rule of construction of ejusdem generis is that general and specific words, which are capable of analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the loss general (3 Words
15 & Phrases, 2328; U. S. v. Baumgartner, 259 Fed. 722, at 725).

So the words "merchandise and chattels" in these two statutes take color from the words "goods and wares" and show that the things contemplated are such as are capable of entering into the commerce of the United States—things that can legally be bought and sold.

Section 5299 (Comp. St. of 1916 and 1918), providing for the seizure and forfeiture of obscene books and articles, does not describe, nor recognize them as "merchandise, goods, or wares," but refers to such objects throughout as "articles," painstakingly designating them as such not less than seven times in this section.

In the Criminal Code, section 245, providing a punishment for the importation and transportation of obscene books and indecent things, they are not described as "merchandise," nor recognized as such, nor as "chattels," but are properly and accurately described as that which they legally are; "articles, matters, and things."

The words "exports and imports," as used in the Constitution, refer only to property. (Vol. 12, Cyc., pp. 1108–B–5.

"The words 'inspection laws,' 'imports,' and 'exports,' as used in cl. 2, sect. 10, art. 1, of the Constitution, have exclusive reference to property.

"This is apparent from the language of cl. 1, sect. 9, of the same article, where, in regard to the admission of persons of the African race, the word 'migration' is applied to free persons, and

16 'importation' to slaves." (People vs. Compagnie Gen. Transatlantique, 107 U. S. 59.)

The words 'exports' and 'imports' can not apply to a dead human body. (In re Wong Yung Quy, 2 Fed. 624; 6 Sawy. 442.)

In the importation of smoking opium, under the laws as at present existing, there can not properly be said to exist an intent to defraud the United States. There is no question of revenue, or loss of anything of value involved. If the illegal importation of such opium—being absolutely prohibited—can be called the working of fraud upon the United States, then the commission of any crime can properly be so designated.

Section 15 of the act of June 22, 1874, the section under which this suit is brought, provides:

"That it shall be the duty of any officer or person employed in the customs revenue service of the United States, upon detection of any violation of customs laws, forthwith to make complaint thereof to the collector of the district, whose duty it shall be promptly to report the same to the district attorney of the district in which such frauds shall be committed. Immediately upon the receipt of such complaint, if, in his judgment, it can be sustained, it shall be the duty of such district attorney to cause investigation into the facts to be made before a United States commissioner having jurisdiction thereof and to initiate proper proceedings to recover the fines and penalties in the premises, and to prosecute the same with the utmost
17 diligence to final judgment." (Sec. 5803, Comp. St. 1916 and 1918.)

Section 16 of the same act provided:

"That in all actions, suits, and proceedings in any court of the United States now pending or hereafter commenced or prosecuted to enforce or declare the forfeiture of any goods, wares or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs revenue laws, or any of such provisions, in which action, suit, or proceeding an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such propostion a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed."

Although section 16, directing the procedure, has been repealed, its provision, requiring that the court, or jury, make a special finding as to whether there was actual fraud, the court being called
18 upon to construe section 15, should still look to section 16 to determine in what sense the word "frauds" is used in section 15.

Section 15 contemplates that a violation of the letter of the statute may occur, without any intent to defraud the United States.

Prohibited goods are ipso facto forfeited by the fact of importation (12 Cyc. 1171; McLane vs. U. S., 31 U. S. (6 Peters) 404; (Anonymous) Federal Case No. 470 (the importation in this case being pictures of a nature to corrupt the public morals; U. S. vs. Jordan, Fed. Cas. 15498):

It is not necessary to include goods not dutiable in a manifest (The S. Oteri, 67 Fed. 146). This has been expressly recognized by Congress in section 7810 (Comp. St. 1916 and 1918), which provides:

"Every yacht, except those of fifteen gross tons or under, visiting a foreign country under the provisions of sections forty-two hundred and fourteen, forty-two hundred and fifteen, and forty-two hundred and seventeen of the Revised Statutes shall, on her return to the United States, make due entry at the custom-house of the port at which, on such return, she shall arrive: Provided, That nothing in this act shall be so construed as to exempt the master or person in charge of a yacht or vessel arriving from a foreign port or place with dutiable articles on board from reporting to the customs officer of the United States at the port or place at which said yacht or vessel shall arrive, and deliver in to said officer a manifest of all dutiable articles brought from a foreign country in such yachts or vessels."

19 Where, in violation of the non-intercourse law of the War of 1812, certain merchandise had been brought to the United States from Great Britain, it was said:

"In point of law, no duties, as such, can legally accrue upon the importation of prohibited goods; * * * ." (McLane vs. U. S., 31 U. S. (6 Peters), 404, at 427.)

In a very recent case in the Northern District of New York, Judge Ray has decided:

"The provision of act Aug. 10, 1917, sec. 15 (Comp. St. 1918; sec. 3115–1/8 #1), making it a criminal offense to import distilled spirits punishable by fine or imprisonment or both, is not a custom law, but a prohibition law enacted under the police power of Congress, and while the seizure and forfeiture, as contraband, of spirits so imported, though not specifically provided for, is essential to the effective enforcement of the law, the court can not impose as an additional punishment the forfeiture of the vehicle used, under another statute" (a customs statute). (U. S. vs. 1 Ford Automobile and 14 Packages of Distilled Spirits, 259 Fed. 894.)

Attorney General Knox, in an opinion rendered the collector of customs at Port Townsend (vol. 29, Op. Atty. Gen. 603), holds that opium prepared for smoking purposes is a nuisance per se, and quotes Freund on Police Power and Hipolite Egg Co. vs. U. S., 220 U. S. 45, at 57 and 58; to the effect that smoking opium is fitted by nature to harm the community; that it is a menace
20 belonging to the class of things that carry their own identifi-

cation as contraband of law, which are outlaws of commerce; that, under the act of February 9, 1919, opium prepared for smoking purposes is legally no longer classed with commercial imports but is a prohibited thing, to be summarily condemned and destroyed, in effect that it is not within the customs laws.

The Attorney General, in his recent opinion, referred to by Judge Ray, approves of, and construes the opinion of Attorney General Knox as to the effect "that a violation of the law prohibiting the importation of smoking opium is not a violation of the customs laws." Section 2809, R. S., and section 15 of the act of June 22, 1874, under which the present suit is brought, are customs laws.

Property is a thing which is the subject of ownership. (N. W. Mutual Life vs. Lewis County, 28 Mont. 484, 491.) Things capable of no use for lawful purposes are not property. (Stanley-Thompson Liquor Co. vs. People, 168 Pac. 750.) There is no right of property in Confederate notes. (Murphy vs. Denman, 18 La. Ann. 55.)

Opium prepared for smoking purposes is contraband. It is an outlaw, both under the laws of the United States and British Columbia. The only reason that there was any question in Northern Commercial Co. vs. Brenneman (259 Fed. 514) as to the right of forfeiture was that interstate commerce was involved and that there were purposes, other than for a beverage, for which alcoholic liquors could legally be used in Alaska.

21 If such liquor had been contraband and not legally usable for any purpose, section 23 of the act considered by the court in that decision—providing that no property right shall exist in the alcoholic liquor—would be unnecessary. This provision of the law was evidently the result of abundant caution, and is the recognition of an existing rule of law, rather than the promulgation of a new one.

Such alcoholic liquor could not be held a nuisance per se, for, under the statute, it could be intended for a lawful purpose. It became a nuisance because it was kept and intended for an unlawful purpose, for beverage purposes. Being of that character, something more was required than a mere inspection of the thing. It is not so with opium prepared for smoking purposes.

It is true that the use of opium prepared for smoking purposes is not prohibited directly, but its use is effectively prohibited by the punishing of one who receives it, and by its possession being made evidence of guilt.

Opium prepared for smoking is not a deodand, customarily an innocent thing, that has become the instrument of doing a particular wrong. Such opium is, itself, a wicked thing, dangerous from the beginning and at all times to human welfare.

Property is the right a man has in a thing held and openly used, or the thing itself in which a man has, and can have a right the law will protect—a thing in which it will protect the right of possession, not a forbidden thing he can not even receive and the bare

22 possession of which is enough to send him to jail. Such a thing is not property.

In a proceeding for forfeiture of opium prepared for smoking purposes, the only issue upon which a claimant would be heard would be whether or not the article was opium prepared for smoking purposes. If it was, it would stand forfeited, and no claim of right in it would avail. Therefore, the necessities, if any, for a forfeiture proceeding do not recognize an article as property.

It is well understood that the tax of $300 per pound on smoking opium of domestic manufacture is one of the means adopted to stamp out traffic in it and is not intended as a recognition of even the domestic article as property.

For smuggling opium, there is a penalty provided of a fine not to exceed $5,000, or imprisonment of not to exceed two years. (Sec. 8801, Comp. St. 1918.) For a violation of the statute regulating domestic manufacture, there is a penalty of not less than $10,000, or imprisonment for not less than five years. (Sec. 6287e, Comp. St. 1916 and 1918.)

The purpose to prohibit the domestic manufacture is clearly shown by the enormous tax levied and other burdens placed upon such business. Such a law was probably enacted to prevent the escape of an accused, in whose possession smoking opium was found, for the law against its importation provides two presumptions:

1st. That opium found in the United States is of foreign growth and manufacture;

23 2d. That the defendant, being shown to be in its possession, may be convicted, unless he satisfactorily explains that possession.

These presumptions were rebuttable. There was left an opportunity for a defendant found in such possession to contend that the smoking opium was of domestic manufacture; but, under the law authorizing its domestic manufacture—the restrictions and punishments being heavier than those for smuggling smoking opium of foreign manufacture, and possession of the domestic article affording a like presumption of guilt sufficient to sustain conviction, this act removed the temptation to attempt to evade punishment for smuggling by setting up the claim that the smoking opium was of domestic manufacture.

"It is well settled that things which are capable of no use for lawful purposes—and it is establishe*m*t that the instruments are of that class—are not the subject of property. They cannot be recovered in replevin, nor will damages be given for their loss or injury. They are, as some courts have said, 'out laws.'" (Stanley-Thompson Liquor Co. vs. People, 168 Pac. 750.)

In Frost vs. People (61 N. E. 1054), it was held:

"Cr. Code, div. 8, providing that gaming apparatus may be seized and destroyed under the direction of the judge, justice or court, is not unconstitutional because depriving persons of property without

due process of law, such apparatus not being the lawful subject of property which the law protects."

24 In Mullen vs. Mosley (Sup. Ct. of Idaho), (12 L. R. A. (N. S.) 394), the court said:

"A 'slot machine' incapable of use for any purpose except in violation of the penal provisions of the anti-gambling law, is not property within the meaning and protection of sec. 13, art. 1, of the State constitution, which provides that 'no person shall * * * be deprived of life, liberty or property without due process of law.'"

Miller vs. C. & N. W. R. Co. (Wis. Cup. Ct.), (45 L. R. A. 334), held that, the use of a gambling device being prohibited by statute, there can be no recovery on account of its injury.

In Board of Police Commissioners vs. Wagner (52 L. R. A. 775), it was held that replevin would not lie for the recovery of an outlawed article, a gambling device.

State vs. Soucie's Hotel (Sup. Jud. Ct. of Maine, 50 Atl. 709), held that a gambling device is noxious per se and distinguishable from intoxicating liquors which will be destroyed only when intended for an unlawful use or purpose See, also, Stave vs. Four Jugs of Intoxicating Liquor (2 Atl. 586) and State vs. Robbins (Ind. Sup. Ct.), (8 L. R. A. 438).

There is another question remaining that—other questions aside, would have to be determined in any event: To justify the imposition of a penalty under sec. 2809, R. S., the court must be able to measure the penalty in the case by the value of the imported thing. This value must be determined by a statutory rule or a common-law rule.

25 As smoking opium is a prohibited thing, it is not a thing of value. It is not an asset. It is a liability. Its value is minus. It is worth less than nothing. It can only do harm. In legitimate articles of commerce, the court may inquire at which price they are freely sold in the open market in the ordinary course; but it is inconceivable that the court will be guided by, and seek to ascertain the ruling quotation for smoking opium as fixed by the furtive exchanges therein effected by criminals in the haunts of vice.

If it were a thing of value, the Government would not destroy it. By condemning it to destruction, the Government says that there is more harm than good in it; that the harm in it offsets the good, if any, and leaves a residuum of harm. The Government does not destroy it as a house in the path of a fire may be destroyed—a good thing made harmful by particular circumstances. It is not destroyed as the skins of the fur seals were once destroyed to protect a monopoly given by the Government. Opium prepared for smoking is destroyed because harm is of its essence, because it is malum in se.

Judge Dundy, of Nebraska, in an unreported decision rendered thirty or more years ago, held that under the statute punishing a post-office employee for embezzling a letter containing an article of value (sec. 5467, R. S., sec. 10365, Comp. Stat. 1916 and 1918), a prosecution could not be had for the embezzlement of a letter contain-

ing a Louisiana lottery ticket because the ticket was not a thing of value, its carrying being prohibited by the postal laws. This
26 rule is amply supported by the cases collected in 25 Cyc. 1653
V.–A–2.

This being true in the case of a lottery ticket, which, under a prohibition law, one court at least has held not to be malum in se (Commonwealth vs. Lottery Ticket, 5 Cush. (Mass.) 369), it follows a fortiori that imported opium prepared for smoking purposes, being malum in se, can have no value at common law.

Goods, wares and merchandise are things of value requiring and justifying expense to bring them to those who need them. Smoking opium is a thing that requires expense to keep it from its victims and to prevent the innocent being exposed to the dangers that lurk in it.

There is no statute of the United States as to values and the method of determining them that is applicable. The only ones that can bear any analogy to the question are in the customs revenue laws. There have been many of these laws and many sections are still in effect. They are too numerous to quote. An outline of the growth and trend of these laws is given in 12 Cyc., pp. 1141, 1142 and 1143. Running through all of them, in words or substance are provisions that value shall be determined as the actual market value, or wholesale price at the time of exportation to the United States in the principal markets of the country from which exported; that such actual market value is the price at which the merchandise is freely offered for sale to all purchasers in such markets; the price which the manufacturer
27 or owner would have received for such merchandise, sold in the ordinary course of trade in the usual wholesale quantities.

The value in the country from which exported is the one looked to in all these statutes. Sales of merchandise in British Columbia are the sole standard of value of exports from that county. Hence, no consideration can be given to the testimony offered regarding values in China and other foreign countries than British Columbia. The sales shown in the latter country were all illicit sales.

There can be no market value of an article which can not be freely offered for sale, so the statutory rule, provided by the customs revenue laws, does not apply. There was no evidence of the cost of production in British Columbia, or, indeed, any that smoking opium is manufactured therein.

It will not be presumed that smoking opium is freely offered for sale in British Columbia, because of the law prohibiting traffic in it.

There is neither a legal rule provided by which to determine the value, if any, of such opium, nor any evidence sufficient to find a value for it.

There still remains to be considered the effect, if any, of section 8801f upon section 2908, R. S. In section 8801f, in speaking of opium, its preparations and derivatives, did Congress intend to include smoking opium? On account of manifest uncertainties and

ambiguities arising under this statute and section 2809, R. S., which it adopts by reference, construction must be resorted to.

Section 2809, R. S., measures the penalty by the value of
28 the merchandise not manifested. This rule is perfectly proper in the case of opium subject to importation; but is it applicable, and did Congress intend it to be applied in forbidden importations of smoking opium not manifested?

Section 8801f directly provides for a penalty and forfeiture to be imposed against the vessel and, the present case being one to recover a penalty from the master, under section 2809, R. S., the construction of section 8801f should not be undertaken by the court further than is necessary.

This section recites that "such vessel shall be liable for the penalty and forfeiture described in section 2809, R. S. * * *."

The only forfeiture stated in section 2809 R. S. is the forfeiture of the merchandise belonging to the master, mate, officers or crew of the vessel. Was it intended by the foregoing to forfeit the interest the vessel had on account of freight in the opium omitted from the manifest, or was it intended to subject the vessel to forfeiture, generally, under sections 5792 and 5766 (Comp. St. 1916 and 1918)? It could not have been intended that the vessel should be liable for a penalty in addition to its own forfeiture.

Generally, merchandise consigned to others than the master, mate, officers or crew and omitted from the manifest is not subject to forfeiture under section 2809, R. S. This shows that it was intended by section 8801f to effect a forfeiture in the case of opium, not applicable to other merchandise. By the former section, for-
29 feiture was not provided for general merchandise (the property of those not connected with the ship) for the default of the master in failing to manifest; but, by section 8801f, in the matter of opium, such forfeiture was provided.

The penalty and forfeiture pronounced are fixed quantities. Therefore, it is likely that Congress would impose the same penalty for the failure to manifest a lawful import as it would a prohibited one, if the manifesting of the latter were contemplated—particularly in view of the severity of the punishment provided for the wilful importation of smoking opium by other sections of the law?

Does not the requirement that opium be manifested, under a penalty if omitted, imply the law's protection of some one in case of compliance with such requirement? No such protection could be provided in the case of the importation of smoking opium. Therefore, it is unreasonable to presume it was intended to be covered by section 8801f.

If no room were left for the operation of the penalty and forfeiture provided for in section 8801f, supra, except in the case of the failure to manifest smoking opium, it could be forcibly contended that a penalty equal to the value of such opium accrued

against the vessel; and the court would have to treat it as a thing of value and search for a measure of value. But such is not the case for, under section 8800 (Comp. Stat., 1916 and 1918), opium and preparations and derivatives thereof, other than smoking opium, or opium prepared for smoking may be imported for medicinal purposes.

30 "Preparations and derivatives," these words, being associated, take color from one another, and, to one of average understanding, "preparations and derivatives of opium" would not suggest smoking opium.

Smoking opium may be prepared from a preparation of opium, or even from the residue of smoking opium, yen shee (sec. 6287a, Comp. St. of 1918). So smoking opium cannot always be accurately described as a preparation of opium, as that expression is ordinarily understood.

Congress, in using the expression "preparations and derivatives" of opium, was using an expression familiar in sections, other than those of this act. (Secs. 5291 (47) and 6287g, Comp. St. 1918.)

That section 8801f, in using the words "preparations and derivatives thereof," contemplates drugs as properly used in medicine is shown by including cocaine: "Opium or cocaine or preparations or derivatives thereof."

Cocaine, its preparations and derivatives are not mentioned in either section 8800 or 8801, or in any of the other sections of the act of January 17, 1914, relating to imports into the United States. But it is included with opium, its preparation and derivatives in section 5291, subsection 47 and section 6287, subsection g (supra), both of which latter include, as associated dangers, hedged about with restrictions: opium and cocaine, preparations and derivatives thereof.

All of those sections are limited to those drugs of which
31 opium and cocaine form the base, and to those alone, further showing that section 8801f should be construed for its proper understanding rather with these two sections, than alone with sections 8800 and 8801, neither of which mentions cocaine.

Any opium, preparations and derivatives thereof, for medicinal purposes, excepting smoking opium, can be imported under regulations prescribed by the Secretary of the Treasury. (Sec. 8800, Comp. St. 1918.) Opium, cocaine, salts, preparations and derivatives thereof, except smoking opium, can be exported to countries regulating their entry, under such regulations. (Sec. 8801d, Comp. St. 1918.)

Having, in the two sections giving the right to import and export opium, its preparations and derivatives (8800 and 8801d), pointed out that the right in neither case extended to smoking opium, may not an intent be shown thereby, in using, in section 8801f, the expression "its preparations and derivatives," not to include smoking opium, providing, as it does, a new penalty for failure to comply

with an existing regulation, as to the manner of importing merchandisable opium?

In sections 8800 and 8801d, in defining what opium can be imported and exported, exactness was necessary; but section 8801f, regulating the procedure and imposing penalties for an irregularity in bringing within the United States something which a right had been given to import, the same exactness in this particular was not requisite. That which can be lawfully imported had already been definitely stated.

32 Under the familiar rule that the enactment of a special statute repeals, or takes the subject out of a general statute which might otherwise include the particular, the limiting of the penalty and forfeiture to the vessel by this latter section would, in any event, indicate an intention on the part of Congress to leave the smuggler to be punished, alone, by fine, imprisonment and forfeiture of the opium, as provided in section 8801, and the master not at all, unless criminally liable. The maximum fine, $5,000, to which the wilful importer is subject, is sufficient in the vast majority of cases to render superfluous a penalty.

There is nothing in the customs revenue laws to indicate—in requiring the making and delivering to Government officers by consignee and ship's officers of merchandise, any intention or purpose, other than to secure and facilitate the determination of the amounts and payments of the duties accruing upon imports.

The danger arising from the lawful importation of opium, its derivatives and preparations for medicinal purposes, except smoking opium, was deemed sufficient to warrant the regulation thereof by the Secretary of the Treasury—not applicable to other merchandise. These regulations are authorized by section 8800. It is fair to presume that the same consideration actuated Congress in providing a penalty (section 8801f) in case of failure to properly manifest opium entitled to importation, which is not provided for in case

33 of any other merchandise, except that of the master, mate, officers or crew of the vessel.

The vessel, if a common carrier, is not, in case of other merchandise, liable, unless the owner or master is a consenting party, or privy thereto, the only remedy being an action against the master. (29 Op. Atty. Gen. 364.) (Sec. 5766, Comp. St. 1916 and 1918.)

Interpretations should be, not according to the letter of the statute, but the intent should be gathered from all parts of the law. The letter should not be followed if a result which is absurd follows, or if a more reasonable meaning presents itself. U. S. v. Hogg, 112 Fed. 909; Interstate Drainage & Investment Co. v. Board of Com'rs, 158 Fed. 270; In re Mathews, 109 Fed. 603.

It is true that one of the surest means of fixing and determining the scope of a statute is the insertion of an exception, or proviso; but, like other canons of construction, its force may be overcome by other evidence of intention. The denial of smoking opium to importation and exportation (sections 8800 and 8801d) is in the

nature of an exception. But this rule would be invoked with better grace for the interpretation of those particular sections than of 8801f, a statute concerning other matters; the manifesting of imports for duty purposes. The first of these statutes defines what opium can be, and can not be imported. The latter provides one of the regulations for the importation of that which can be im-
34 ported. There was, therefore, need for the exception in the former, in order to remove all doubt—not so in the latter.

The rule of interpretation by considering the exception is used to determine those things which do fall within the wider scope of the statute as indicated by those things which have been excepted from its effect. But this rule can not be invoked for that purpose here, at least with the same force, because the only thing excepted is smoking opium and nothing else is claimed to fall within the statute, similar in nature to smoking opium, by reason of the latitude given the statute by such exception.

"The usual office of a proviso is to except something out of the statute which otherwise would be in it." (Deitch v. Staub, 115 Fed. 309, at 310.)

"Ordinarily, the office of a proviso in a statute is to modify or restrain the enacting clause." (U. S. v. Kansas City So. Ry. Co., 189 Fed. 471, at 472.)

" * * * It is no doubt the general rule that a proviso to a particular section does not apply to other sections, and that it is to be construed with reference to the immediately preceding parts of the clause to which it is attached. But such rule is not controlling, especially in such composite structures as tariff and appropriation acts. In U. S. v. Babbit, 1 Black, 55, 17 L. Ed. 94, it was held that the particular proviso then under consideration was 'not limited in its effect to the section where it is found, that is
35 was affirmed by Congress as an independent proposition, applying alike to all officers of 'this class,' including officers not mentioned in the section which contained the proviso. The true rule seems to be that, 'while the position of a proviso in a statute has a great and sometimes a controlling influence upon the extent of its application, yet the inference from its position can not overrule its plain general intent.' Lewis' Sutherland Statutory Construction (2d ed.), sec. 352, and authorities cited." (U. S. vs. R. F. Downing & Co., 146 Fed. 56, at 59.)

Applying the rule announced in this case, the express exception of smoking opium in section 8800 becomes, by implication, a part of section 8801f.

Statutes are construed with reference to the common law. In construing statutes in derogation of the common law, there should be no further or greater departure than the statute expressly declares.

The statute, the effect of which is to recognize rights of property or value, in an outlawed thing, a nuisance per se, a thing malum in se, is, certainly, in derogation of the common law. Before it can be

given such effect, it must clearly so declare. This, section 8801f does not do.

If such a radical departure from established principles was contemplated as to undertake to give the qualities of property and value to an outlawed thing, respect for the uniform administration of the law, would, doubtless, have suggested to the enacting Congress that such purpose be clearly and unequivocally expressed. This, it
36 has not done, hence, I conclude it did not so intend. If such departure was intended, it would not relate back to give to section 2809, R. S., a different effect, in so far as the imposition of the penalty therein provided against the master was concerned—whatever might be its effect regarding the liability of the vessel.

It is not intended by anything said herein to hold that section 8801f does not provide for a forfeiture of a vessel on account of failure to manifest smoking opium, but the provision for a penalty equal to the value must be limited to cases where the subject of importation is merchandisable opium.

Judgment for the defendant.

[Indorsed:] Decision on the merits. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 22, 1919. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

No. 4038.

Judgment.

On motion of the defendant in the above-entitled cause, the plaintiff appearing by its United States attorney, and the defendant appearing by his attorney, the court being sufficiently advised,—

It is considered and adjudged by the court here that the plaintiff, United States of America, take nothing by this action; that the writ of attachment herein issued and the lien of the levy thereof
37 be and the same hereby are discharged; and that the defendant, Wesley L. Sischo go hence without day.

Dated this 5th day of April, 1920.

EDWARD E. CUSHMAN,
District Judge.

O. K.—D. L., atty. for dft.

[Indorsed:] Judgment. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

No. 4038.

Bill of exceptions.

Be it remembered, that on the trial of this case on December 3, 1918, the United States appearing by its district attorney, and the defendant appearing by his attorney and in person, such proceedings

were had as that evidence was adduced tending to prove all the allegations of the complaint or information, except the allegation as to the value of the opium seized by the collector of customs, and as to that allegation, Henry Blackwood was introduced as a witness on behalf of the plaintiff, and after being duly sworn, testified that at the time of the seizure by the collector of customs of the opium described in the complaint or information, and also at the time of testifying he, Blackwood, was special deputy collector of customs for the customs collection district of Washington, to wit, district No. 30,
and that the collector of customs for said district had imposed
38 a penalty in the sum of sixty-four hundred dollars ($6,400)
against the above-named Wesley L. Sischo under the provisions of section 2809 of the Revised Statutes of the United States, which he testified was equal to the value of one hundred five-tael tins of opium prepared for smoking purposes, seized by said collector on board the launch "Nellie Evelyn" off Point Partridge, Whidby Island, Washington, on December 7, 1917, by Ben Lichtenberg, boatswain of the United States Coast Guard, and testified that said opium was imported on said launch from Canada while in charge of said Sischo without having any manifest on board, and testified further that said penalty had not been paid; said Blackwood further testified that said opium had been shipped to the United States Public Health Service at Washington, District of Columbia, for the recovery of the morphia contents thereof; said witness further testified that opium prepared for smoking purposes was openly sold in the Portuguese colony of Macao.

Be it further remembered, that upon the said trial one A. B. Hamer was introduced and sworn as a witness on behalf of the plaintiff, and thereafter testified that theretofore the said Sischo had told said Hamer that he, Sischo, had paid sixty-four hundred dollars ($6,400) for said opium; that no further material evidence was offered or adduced, and no findings of fact or conclusions of law were requested or made by the court.

On February 11, 1920, an order was duly made and entered in this cause to the effect that the time in which to file and serve and have
certified the bill of exceptions and to file and serve assignments
39 of errors be, and by the said order was, extended to and including the 15th day of April, 1920, and on the 15th day of April, 1920, a further order was duly made and entered extending the time for the settlement and certification of such bill of exceptions to and including the third day of May, 1920.

UNITED STATES OF AMERICA,
Western District of Washington, Southern Division, ss:

I, Edward E. Cushman, the judge of the District Court of the United States for the Western District of Washington, Northern Division, before whom the above-entitled cause was tried, do hereby certify that the matters and proceedings set forth in the foregoing bill of exceptions are matters and proceedings which occurred on

the trial of said cause, and the same hereby are made part of the record herein; counsel for the respective parties hereto being present and concurring herein.

In witness whereof I have hereunto set my hand this 3d day of May, 1920, at Seattle, in said district.

[SEAL.] EDWARD E. CUSHMAN,
Judge.

[Indorsed:] Bill of exceptions. Filed in the United States District Court, Western District of Washington, Northern Division. May 3, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

40 No. 4038.

Petition for writ of error.

Comes the United States of America, plaintiff in the above-entitled cause, and feeling aggrieved by the final judgment herein entered on November 22, 1919, petitions this court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and according to the laws of the United States in that behalf made and provided, there to correct certain errors committed to the prejudice of the said plaintiff, which more in detail appear from the assignment of errors filed with this petition, and prays that a writ of error issue out of said Court of Appeals, for the correction of the error so complained of, and that the transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to said Court of Appeals.

ROBERT C. SAUNDERS,
United States Attorney,
F. R. CONWAY,
Assistant United States Attorney,
Attorneys for Plaintiff.

[Indorsed:] Petition for writ of error. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

41 No. 4038.

Assignment of errors.

The plaintiff assigns errors in the rulings, decisions and judgment of the District Court as follows:

I.

The District Court erred in holding and deciding that smoking opium is not merchandise within the meaning of sec. 2809, Revised Statutes.

II.

This District Court erred in holding and deciding that smoking opium has no value within the meaning of sec. 2809, Revised Statutes.

III.

The District Court erred in rendering judgment for the defendant.

ROBERT C. SAUNDERS,
United States Attorney.
F. R. CONWAY,
Assistant United States Attorney.

[Indorsed:] Assignment of errors. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

No. 4038.

Order allowing writ of error.

Comes the plaintiff United States of America, by its attorneys, and files herein and presents to the court its petition praying
42 for the allowance of a writ of error on assignment of error intended to be urged, and praying also that a transcript of record and proceedings, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings be had as may be proper in the premises. Now, on consideration thereof, the court does hereby allow the writ of error prayed for.

EDWARD E. CUSHMAN,
United States District Judge.

[Indorsed:] Order allowing writ of error. Filed in the United States District Court, Western District of Washington, Northern Division. April 5, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

No. 4038.

Acceptance of service.

Due service on this day of the following named papers this day filed in the office of said court is acknowledged, to wit: Writ of error, order allowing writ of error, assignment of errors, citation on writ of error, præcipe for transcript of record.

Dated April 5, 1920.

DANIEL LANDON,
Attorney for Defendant, Wesley L. Sischo.

43 [Indorsed:] Acceptance of service. Filed in the United States District Court, Western District of Washington, North-

ern Division. Apr. 7, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

No. 4038.

Stipulation re preparation of transcript of record.

It is stipulated that in the preparation of this cause of a transcript on writ of error to the Circuit Court of Appeals, all captions, entitlements and endorsements, except the file-marks of the clerk on papers filed subsequent to judgment, shall be omitted.

ROBERT C. SAUNDERS,
United States Attorney.
F. R. CONWAY,
Assistant United States Attorney.
DANIEL LANDON,
Attorney for Defendant.

[Indorsed:] Stipulation. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

No. 4038.

Præcipe for transcript of record.

To F. M. Harshberger, clerk of the United States District Court for the Western District of Washington:

44 Please prepare and certify in proper form to constitute the record in this cause, upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, typewritten copies of the following named portions of the record and the files in said cause, omitting therefrom, however, all entitlements and endorsements, except your file marks, to wit:

1. This præcipe.
2. Complaint.
3. Appearance of attorney for defendant.
4. Answer.
5. Minute entries made at the trial.
6. Decision on the merits filed Nov. 22, 1919.
7. Final judgment.
8. Bill of exceptions and order settling same.
9. Petition for writ of error.
10. Assignment of error.
11. Order allowing writ of error.
12. Writ of error.
13. Citation in error.

14. Stipulation as to transcript.
15. Acceptance of service.
Dated April 5, 1920.

ROBT. C. SAUNDERS,
United States Attorney.
F. R. CONWAY,
Assistant United States Attorney.

We waive the provisions of the act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under rule 105 of this court.

ROBT. C. SAUNDERS,
United States Attorney.

45 [Indorsed:] Præcipe. Filed in the United States District Court, Western District of Washington, Northern Division. April 5, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

United States District Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WESLEY L. SISCHO, DEFENDANT.
} No. 4038.

Certificate of clerk U. S. District Court to transcript of record.

UNITED STATES OF AMERICA,
Western District of Washington, ss.

I, F. M. Harshberger, clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript consisting of pages numbered from 1 to 41, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as is required by præcipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of said United
46 States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred, chargeable to the United States, and that the said sum will be included in my emolument return for the quarter ending June 30, 1920, for making typewritten transcript of record to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (sec 828 R. S. U. S.), for making record, certificate or return, 110 folios at 15c	$16.50
Certificate of clerk to transcript of record, 4 folios at 15c	.60
Seal to said certificate	.20

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said district, this 18th day of May, 1920.

[SEAL.] F. M. HARSHBERGER,
Clerk United States District Court.

47 United States District Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WESLEY L. SISCHO, DEFENDANT. } No. 4038.

Writ of error.

United States of America.

The President of the United States of America, to the District Court of the United States, for the Western District of Washington, Northern Division, greeting:

Because in the record and proceedings, as also in the rendition of the judgment before you, between the United States of America, plaintiff, and Wesley L. Sischo, defendant, a manifest error hath happened to the damage of said plaintiff, we being willing that such error, if any, hath happened, should be duly corrected, and full and speedy justice done to the plaintiff in error aforesaid, on this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of such court, in the city of San Francisco, State of California, together with this writ, so that you have the same at
48 said place before the justices aforesaid on thirty days from the date of this writ. That the record and proceedings aforesaid being inspected, said justices of said Circuit of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 5th day of April, A. D. 1920.

[SEAL.] F. M. HARSHBERGER,
Clerk of the District Court of the United States,
for the Western District of Washington,
Northern Division.
By S. E. LEITCH, *Deputy Clerk.*

The foregoing writ is hereby allowed this 5th day of April, A. D. 1920.

EDWARD E. CUSHMAN, *Judge.*

[Endorsed:] No. 4038. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, plaintiff, vs. Wesley L. Sischo, defendant. Writ or eror. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

49 United States District Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WESLEY L. SISCHO, DEFENDANT. } No. 4038.

Citation on writ of error.

United States of America, ss.

The President of the United States to Wesley L. Sischo, greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a writ of error duly issued and now on file in the office of the clerk of the United States District Court for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why so much of the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the party in that behalf.

50 Witness the Honorable E. D. White, Chief Justice of the Supreme Court of the United States, this 5 day of April, 1920.

[SEAL.]

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed:] No. 4038. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America vs. Wesley L. Sischo, defendant. Citation on writ of error. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

[Endorsed:] No. 3499. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, plaintiff in error, vs. Wesley L. Sischo, defendant in error. Transcript of rec-

ord upon writ of error to the United States District Court of the Western District of Washington, Northern Division.
Filed May 21, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By PAUL P. O'BRIEN,
Deputy Clerk.

51 United States District Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WESLEY L. SISCHO, DEFENDANT.
} No. 4038.

Order extending time to and including February 15, 1920, to file transcript of record and docket cause.

Now on this 14 day of January, 1920, upon motion of the attorney for the complainant and for sufficient cause appearing, and the defendant appearing through his counsel, Daniel Landon, and consenting to such order—

It is therefore hereby ordered that the time in which to file the transcript of record herein in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the fifteenth day of February, 1920.

JEREMIAH NETERER,
United States District Judge.

We consent to entry of the above order.

DANIEL LANDON,
Attorney for Wesley L. Sischo.

[Endorsed:] No. 4038. In the District Court of the United
52 States for the Western District of Washington, Northern Division. United States of America, plaintiff, vs. Wesley L. Sischo, defendant. Order extending time to file transcript of record. Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 14, 1920. F. M. Harshberger, clerk. By S. E. Leitch, deputy.

United States District Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WESLEY L. SISCHO, DEFENDANT.
} No. 4038.

Order extending time to and including June 3, 1920, to file transcript of record and docket cause.

On motion of the United States attorney, the court being sufficiently advised in the premises, it is

Ordered, That the time for filing transcript of record in the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, is hereby extended to and until June 3, 1920.

Dated this 4th day of May, A. D. 1920.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed:] No. ——. In the District Court of the United
53 States for the Western District of Washington, Northern Division. United States of America, plaintiff, vs. Wesley L. Sischo, defendant. Order. Filed in the United States District Court, Western District of Washington, Northern Division. May 4, 1920. F. M. Harshberger, clerk. By S. E. Leith, deputy.

No. 3499. United States Circuit Court of Appeals for the Ninth Circuit. Two orders under subdivision 1 of rule 16 enlarging time to and including June 3, 1920, to file record and docket cause filed May 21, 1920. F. D. Monckton, clerk.

[Endorsed:] Printed transcript of record. Filed July 6, 1920. F. D. Monckton, clerk.

54 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
WESLEY L. SISCHO, DEFENDANT IN ERROR. } No. 3499.

Upon writ of error to the United States District Court of the Western District of Washington, Northern Division.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit, the September term, A. D. 1920, of
55 the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room, in the city of Seattle, in the State of Washington, on Tuesday, the twenty-first day of September, in the year of our Lord one thousand nine hundred and twenty.

Present: The honorable William B. Gilbert, senior circuit judge, presiding; the honorable William H. Hunt, circuit judge; the honorable Charles E. Wolverton, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
WESLEY L. SISCHO, DEFENDANT IN ERROR. } No. 3490.

Order of submission.

Ordered above-entitled cause argued by Mr. Robert C. Saunders, United States attorney, and counsel for the plaintiff in error, and by Mr. Daniel Landon, counsel for the defendant in error, and submitted to the court for consideration and decision.

56 At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Monday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-one.

Present: The honorable William B. Gilbert, senior circuit judge, presiding; the honorable Erskine M. Ross, circuit judge; the honorable William W. Morrow, circuit judge.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
WESLEY L. SISCHO, DEFENDANT IN ERROR. } No. 3499.

Order directing filing of opinion and dissenting opinion and filing and recording of judgment.

By direction of the honorable William B. Gilbert and William H. Hunt, circuit judge, and the honorable Charles E. Wolverton, district judge, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this court in the above-entitled cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in said cause in accordance with said opinion.

By direction of the honorable William H. Hunt, circuit judge, ordered that the dissenting opinion written by him and this day rendered in said cause be forthwith filed by the clerk.

57 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
WESLEY L. SISCHO, DEFENDANT IN ERROR. } No. 3499.

Robert C. Saunders and Robert E. Capers for plaintiff in error; Daniel Landon for defendant in error.

Before Gilbert and Hunt, circuit judges, and Wolverton, district judge.

WOLVERTON, District Judge:

This is an action instituted by the Government, under section 5803, Comp. Stat. 1918, to recover a penalty imposed by the collector of customs against the defendant, Wesley L. Sischo, in the sum of $6,400, for importing into this country 100 five-tael tins of opium, prepared for smoking purposes, without including the same in the ship's manifest. Sischo was the owner and master of the gasoline launch by which the opium was brought in, and the penalty was imposed under section 2809 of the Revised Statutes.

The question involved for decision is whether Sischo was subject to be penalized by the collector of customs for not having in-
58 cluded the opium in the vessel's manifest.

Section 2806, Revised Statutes, inhibits the bringing of any merchandise from any foreign port into the United States in any vessel unless the master has on board manifests in writing of the cargo, signed by such master. Sections 2807 and 2808 provide what the manifests shall contain and how the merchandise destined to be delivered at different districts or ports shall be listed and arranged thereon. Section 2809 reads as follows:

"If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

By section 2766, "The word 'merchandise,' as used in this title, may include goods, wares, and chattels of every description capable of being imported."

These statutes were obviously designed to enable the Government, among other things, to collect the duties upon all dutiable articles coming into this country from foreign ports; and to that end it was desirous that it be advised by the manifests of what merchandise capable of being imported was aboard ship, so that the proper assessment of duties could be made by the collector of customs.

Let it be observed that the master is subject to a penalty equal to the value of all such merchandise not included in the manifest; and if such merchandise not so included is consigned to or belongs to the master, it shall be forfeited. Thus the master,
59 as it relates to his own goods, is not only penalized to the extent of their value, but he loses his goods as well—a very drastic punishment—all, it must be noted, for failure to manifest them. But it seems that he is not further penalized as a smuggler, or for an attempt to introduce goods into the United States without paying the duty to which they are subject, by reason of such failure.

Smuggling is a distinct offense, and is denounced by different statutes, and penalized according to the nature of the act and the article or goods involved, and is more particularly defined by section 5798, U. S. Comp. Stat. 1918 (Compact Edition), which reads in part:

"Provided, That for the purposes of this act (of June 22, 1874, #4, 18 Stat. 186), smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination."

The importation of opium into the United States in any form is declared to be unlawful, with the exception "that opium and prep-

arations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only," under regulations of the Secretary of the Treasury, "and when so imported shall be subject to the duties which are now or may hereafter be imposed by law." #8800, U. S. Comp. Stat. 1918 (Compact Ed.).

Section 8801 denounces the importation of opium contrary
60 to law, and affix a penalty of forfeiture, accompanied by fine and imprisonment, making the offense a felony. Section 8801f makes provision as follows:

"Whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections 2806 and 2807 of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section 2809 of the Revised Statutes."

The defendant Sischo has been prosecuted under section 8801, Comp. Stat. 1918. He was convicted, and is now serving a term in the penitentiary. The opium found in his possession was forfeited to the Government, as was also his gasoline launch. Under what sections the forfeiture of the opium and the vessel was exacted does not appear.

The inquiry here presented turns wholly upon the meaning to be attributed to the phrase "capable of being imported." Does it apply to such merchandise as may lawfully be imported into this country, or does it apply to all goods, wares, and chattels, of whatsoever nature, that might be brought in, whether of prohibited introduction or not?

It must not be overlooked that the statutes with which we are dealing are customs statutes, and are designed for the enforcement of the collection of revenues assessable upon dutiable articles. To this end, no doubt, it is required that all merchandise capable of importation shall be contained in the ship's manifests, so that the customs officers may determine what is subject to duty and what is
61 not. It would not be expected that articles prohibited introduction within the United States would be mentioned in the manifest, because the presumption would be that the master would not bring them in, for if he did he would breach the law and subject himself to the penalty imposed for importing prohibited articles. Congress, therefore, had no occasion to legislate in these statutes for the protection and the enforcement of the payment of duties on merchandise which it did not intend should be brought in under any conditions.

But why should Congress deem it necessary to qualify the term merchandise by the phrase "capable of being imported" if it intended to comprise all goods, wares and chattels of whatsoever nature, or, we may say, all such as are susceptible of being carried from one country into another? "Words of common use are to be

understood in their natural, plain, ordinary and genuine signification as applied to the subject matter of the enactment." Endlich on Interpretation of Statutes, # 2. But it is self-evident that such meaning may be limited by the context.

"Merchandise" signifies, in general, "any movable object of trade or traffic; that which is passed from hand to hand by purchase and sale; specifically, the objects of commerce; a commercial commodity or commercial commodities in general; the staple of a mercantile business; commodities, goods, or wares bought and sold for gain." Century Dictionary.

62 "Chattel" is a term of broader signification, and includes "every species of property, movable or immovable, which is less than a freehold." Bouvier's Law Dictionary.

But, of course, Congress did not intend by the use of that term to include chattels real, and it is only chattels personal to which the law alludes.

"Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another." Bouvier's Law Dictionary.

The word "capable" is used in different senses, but among the synonyms given by the Century Dictionary are "qualified," "fitted," "adapted."

Now, if Congress meant by its definition of merchandise to embrace all goods, wares, and chattles capable of being transferred from one place to another, or of being transported, why did it not so enact—why did it say "capable of being imported" instead? We must attribute to Congress some apt purpose in choosing language to define or express its meaning. It is clear that "capable of being imported" and "capable of being transferred from one place to another," or transported, are not equivalent expressions, and we must assume that Congress understood the distinction, and therefore chose the former to express more precisely its purpose and meaning. Things that are prohibited entry into this country are not, in a legal sense, adapted to or susceptible of entry; and, Congress seek-

63 ing to be specific, may we not reasonably infer that it used the phrase "capable of being imported" designedly and deliberately to include those things importable, and not all things transferable or transportable?

One of the secondary meanings given the word "capable" is, "Having legal power or capacity: as, a bastard is not capable of inheriting an estate." Century Dictionary.

The word in that sense has been given judicial interpretation. In Burgeet v. Barrick, 25 Kan. 526, it is held that the langauge "capable of contracting" used in the local statute was to be understood as "legally capable of contracting, and not that a minor is mentally and physically capable of contracting."

So the word may be applied to things impersonal as well, and thus to things capable of being imported, and, so applied, may signify things lawfully capable of importation. It was so applied In re Henderson and City of Toronto, 29 Ontario Reports, 669, where it was held that a document not entitled to be registered was not an "instrument capable of registration."

Stress is laid upon the words "brought into" as used in section 2809, as somehow interpretative of import or imported. But it must be borne in mind that they qualify "merchandise," and merchandise gets its meaning from section 2766, accompanies with the restrictive words "capable of being imported." These expressions are found in the same title, and are to be considered in pari materia.

64 In United States v. Merriam et al., 26 Fed. Cases, 1237, 1239 (No. 15759), in construing the language of section 4 of the act of July 18, 1866 (14 Stat. 179), which reads, "that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares, or merchandise, contrary to law," the court says:

"Now, to import, in its general signification, means to bring into the United States. Why then are these additional words, 'or bring' into the United States, used? They are either mere surplusage, or they mean something more than what is included in the words 'to import,' according to their ordinary signification. To import goods, wares, and merchandise into the United States, in the connection in which the words are here used, evidently means an importation in the ordinary manner, so far as the means and manner of importation are concerned, but contrary to law. 'To bring' goods, etc., into the United States, in the connection in which the words are used, means the introduction of goods, etc., into the United States by any other means or in any other manner than that of importation proper, contrary to law."

This language as used has relation to the bringing in of dutiable articles contrary to law.

The court, in United States v. Chesbrought, 176 Fed. 778, 783, in consideration of section 3082, R. S., adopts this view, and concludes:

"These words in my opinion have a plain meaning, and call for no interpretation. They comprehend the bringing into this country of dutiable articles."

According to these cases, the words "import" and "bring in" are not synonymous, and their special bearing here is that they are to be construed with reference to the connection in which they are employed. The statutes under consideration were and are contained in a different title, and are unrelated to the subject matter

65 with which we are dealing.

In the case of United States v. Caminata, 194 Fed. 903, 904, wherein was involved the second section of the opium act of February 9, 1909, 35 Stat. 614 (#8801 Comp. Stat.), the court expressly agreed with the argument of the United States attorney, wherein was used this language:

"This act is not a customs law designed to avoid fraud upon the revenue, but is purely a prohibitory statute, absolutely forbidding the bringing into this country from abroad of an article deemed by Congress to be injurious to the health and morals of our people. The act has no relation to the customs system."

We do not think the language of the Attorney General (21 Opinions of Attorney General, p. 94) is conclusive, wherein he says:

"The word 'merchandise' is used in different senses in different parts of our customs legislation. In Revised Statutes, sections 2766 and 3111, it covers any tangible personal property. In sections 2795 and 3113 it means property imported into the country, whether for sale or not. In the act of 1875 it has a narrower meaning, but still includes all personal property not imported for the use or enjoyment of the importer himself."

The learned Attorney General had not before him the exact question here involved, and his attention was perhaps not specifically called to the particular and peculiar language of section 2766. The comment is valuable, however, in that it subscribes to the interpretative principle that the meaning of the word must be sought for with respect to the especial sense in which it is used in the particular statute where it is found.

It is a bootless task, therefore, to attempt to fix the signifi-
66 cation of words and phrases by their use in totally unrelated statutes.

Our attention has been called, arguendo, to section 8801f, Comp. Stat., supra, as a legislative construction of the word "merchandise," and as to what should be included in the manifest.

This statute was adopted at a much later date, and we should bear in mind that opium and its derivatives, except smoking opium, are subject to importation for medicinal purposes, and it is no doubt the intendment of section 2809, R. S., that such merchandise should be included in the vessel's manifest. It is capable of being imported in the sense that its importation is not unlawful. Otherwise, it was competent for Congress to extend the provisions of section 2809 to require all opium, whether its importation were lawful or unlawful, to be shown on the vessel's manifest for the purpose of penalizing the vessel. Certainly Congress did not go further than to apply section 2809 in its enlarged sense to opium and its derivatives, and for the one purpose of penalizing the vessel, not its master.

From these considerations, we are led to the conclusion that it is the intendment of the statute here in review that the word "merchandise" shall comprise only such goods, wares, and chattels as may be lawfully brought into this country, and that the defendant was not legally subject to be penalized for not having included the opium, that is, smoking opium, in the vessel's manifest. Affirmed.

[Endorsed:] Opinion. Filed Feb. 7, 1921. F. D. Monckton, clerk. By Paul P. O'Brien, deputy clerk.

67 HUNT, Circuit Judge, dissenting:

The statutes pertaining to entry of merchandise, chapter four, collection of duties on imports, provide that no merchandise shall be brought into the United States from any foreign port in any vessel unless the master has on board a manifest containing certain specific information. Sections 2806, 2807, 2808, R. S. U. S. Section 2809 provides that "If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers of crew of such vessel shall be forfeited." Section 2766, R. S. U. S. (sec. 5462, U. S. Com. St. 1916), provides as follows: "The word 'merchandise' as used in this title may include goods, wares, and chattels of every description capable of being imported." The controlling statute which provides for liability of the master to the penalty is section 2809. The terms of that section seem to us plainly to refer to merchandise "brought" into the United States and not included in the manifest

I cannot find substantial ground upon which to hold that goods of every description "capable of being imported" shall be only such goods and wares and chattels as may be lawfully entered through the customs houses, or to which is attached the right
68 of the United States to assess and collect duties. The fact that the goods brought in may be prohibited from being entered does not relieve the master from included them in the manifest, as required by sections 2806, 2807, and 2808. "Capable" of being imported means, under the terms of section 2766, such goods and chattels as can be brought over—not lawfully brought over and entered, but such as can physically be brought. Section 2766 is to be read, I think, not as one of limitation as to the right to import under the law, nor as defining what may be lawfully entered in the customs houses, but as a comprehensive inclusion of all goods that it is possible to transport from another country into this. There is nothing tangible in the way of goods, wares, and chattels, which may not be brought within the term "merchandise," whether intended for trade or not. In Opinions of Atty. Gen., Vol. XXI, p. 94, Mr. Olney held that the word "merchandise" was used in different senses in different parts of the customs laws. He said: "In Revised Statutes, sections 2766 and 3111, it covers tangible property. In sections 2795 and 3113 it means property imported into the country whether for sale or not. In the act of 1895 it has a narrower meaning, but still includes all personal property not imported for the use or enjoyment of the importer himself." Suppose a cargo of liquor is brought over, or a quantity of aigrette or osprey plumes, or skins of wild birds, none of which may lawfully be brought into the country, would not the statute

defining merchandise include them? Or, must the collectors of customs hold that because those articles are contraband they need
69 not be put upon the manifest; that merely because they cannot lawfully be imported they are not "merchandise," hence can not be brought in to the country, and the master of the ship who brings them and has not included them in the manifest is not liable under section 2809? Such a construction seems to me to be too restrictive of the words of the statute.

In section 8800, Com. St. 1918, Congress provided that after April 1, 1909 (act of January 17, 1914), "it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof except for medicinal purposes." It was also provided by section 2 of the act that if any person shall fraudulently or unlawfully "import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof, contrary to law," he shall be punished and the opium shall be forfeited. And again in section 3 of the act it was provided that all smoking opium or opium prepared for smoking found within the United States on and after July 1, 1913, shall be presumed "to have been imported after April 1, 1909." In those sections it seems clear that "imported" is used in its ordinary sense. In vol. 27 of Opinions of the Attorney General, p. 440, the question arose whether under the general statutes, sections 2962, 2971, 2976, and 3005, R. S. U. S., regulating depositing in bond and transshipment of "merchandise," smoking opium brought from a foreign country and destined to another foreign country could be entered for warehousing and for immediate exportation by another ship. The ruling was that
70 under the general customs law "the entering of merchandise for immediate exportation and without intent that it shall enter the commerce of the country is not an importation," and that since smoking opium was not subject to the payment of duties and the bringing of opium into port by one ship for immediate exportation by another is not importation, its transfer from one vessel to another could be lawfully made. No question seems to have been made whether smoking opium was or was not merchandise.

In the United States vs. Chesbrough, 176 Fed. 778, defendant was indicted for violating section 3082, R. S. U. S., which provides that if any person shall fraudulently "import or bring into the United States * * * any merchandise contrary to law," such merchandise shall be forfeited and the offender shall be punished. It was contended that the words "import or bring" and "merchandise" as used in section 3082 exclude articles brought in as baggage, and the argument was that the importation of merchandise contrary to law, which was penalized by the section, is the importation of general merchandise as distinguished from baggage. But it was held that the limitation sought to be placed upon the word "merchandise" was entirely too restricted, and that the proper construction was to give to the word "merchandise" a natural, plain, and ordinary signification. It was also contended that the word "im-

port" should be given a technical rather than an ordinary meaning, but it was held that a technical definition could not control in the case of dutiable merchandise brought in as personal baggage. The court said that the words "import or bring" were not necessarily synonymous and that Congress, having used both words, intended to give the broader scope to the statute and to comprehend
71 the bringing into the country of dutiable articles. The reasoning of the case is applicable to the words used in section 2809, that if any merchandise is "brought" into the United States. I think the broader object of the statute is attained by this view.

In United States vs. Caminati, 194 Fed. 903, defendant was prosecuted for smuggling smoking opium. The court cited the act of Congress of February 9, 1909 (c. 100, sec. 1, 35 St. 614), which prohibits the importation of opium into the United States except for medicinal purposes, and section 2 which makes such importation penal, and held that the phrase "import or bring" as used in section 3082 may or may not be synonymous, according to the legislative purpose for which they are used, but that the word "import" should not be limited to the actual landing of goods but should be understood to have been used in the light of the legislative purpose which was to prohibit the bringing of opium into the country, rather than to provide for the violation of a customs law designed to avoid fraud upon the revenue.

Again, section 8801f, Com. St. 1918, sec. 2 of the act of January 17, 1914, provides that whenever opium is found upon any vessel arriving in port of the United States "which is not shown upon the vessel's manifest as is provided by section 2806 and 2807 of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section 2809 of the Revised Statutes." This section confirms us in the opinion that the word "merchandise" as used in section 2809 includes opium even though denied entry.
72 The rulings of the Treasury Department define opium as covering all forms of opium known to the trade, including smoking opium; and the Secretary of the Treasury (Treas. Dec. No. 32083) has made provision for cases where prohibited opium is found on board a vessel "not manifested" by directing that in such case the fine should be paid as it does not fall within the provision of section 2810 of the Revised Statutes. Section 2810 has reference to instances where part of the cargo without proper manifest is unshipped except such as is accounted for by the master, and where the manifests have been lost or mislaid without fraud or are incorrect by mistake. In such an event no forfeiture or penalty shall be incurred under section 2809.

In the customs regulations of 1915, article 97, section 2809 is quoted and it is advised that in all cases where opium is found on board a ship not manifested, the fine specified in section 2809 shall be imposed.

With respect to the value of the smoking opium, the rulings of the Treasury Department provide that for the purpose of assessing

the fine under section 2809, supra, the value of the prohibited opium is the foreign value. Treas. Dec. No. 32083, December, 1911. In the present instance the value of $6,400 was fixed by the customs officers as based upon the statements of the defendant below, who said that he had paid that sum for the opium in British Columbia. In a case of this character this was sufficient evidence of the value.

For these reasons I believe judgment should be reversed and the case remanded for a new trial.

[Endorsed:] Dissenting opinion. Filed Feb. 7, 1921. F. D. Monckton, clerk. By Paul P. O'Brien, deputy clerk.

73 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
WESLEY L. SISCHO, DEFENDANT IN ERROR. } No. 3499.

Judgment.

In error to the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed:] Judgment. Filed and entered February 7, 1921. F. D. Monckton, clerk. By Paul P. O'Brien, deputy clerk.

74 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
WESLEY L. SISCHO, DEFENDANT IN ERROR. } No. 3499.

Certificate of clerk U. S. Circuit Court of Appeals to record certified under section 3 of rule 37 of the rules of the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-three (73) pages, numbered from and including 1 to and including 73, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals made pursuant to the request of counsel for the plaintiff in error, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this twenty-fourth day of March, A. D. 1920.

[SEAL.] F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

75 United States of America, ss:

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Ninth Circuit, greeting:

Being informed that there is now pending before you a suit in which the United States of America is plaintiff in error and Wesley L. Sischo is defendant in error, No. 3499, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Washington, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
76 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Joseph McKenna, Senior Associate Justice of the Supreme Court of the United States, the fourteenth day of June, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Indorsed:] File No. 28255. Supreme Court of the United States. No. 898, October Term, 1920. The United States of America vs. Wesley L. Sischo. Writ of certiorari. No. 3499. United States Circuit Court of Appeals for the Ninth Circuit. Filed June 28, 1921. F. D. Monckton, clerk. By Paul P. O'Brien, deputy clerk.

77 In the Supreme Court of the United States, October term, 1921.

No. 313.

WESLEY L. SISCHO, RESPONDENT,
vs.
UNITED STATES, PETITIONER.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record

now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to the writ of certiorari granted therein.

(Sgd.) WM. L. FRIERSON,
Solicitor General.

H.

(Sgd.) DANIEL LANDON,
Counsel for Respondent.

June 15, 1921.

[Endorsed]: Stipulation as to return to writ of certiorari. Filed June 28, 1921. F. D. Monckton, clerk.

78 United States Circuit of Appeals for the Ninth District.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
WESLEY L. SISCHO, DEFENDANT IN ERROR. } No. 3499.

Certificate of clerk U. S. Circuit Court of Appeals to stipulation as to return to writ of certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true, and correct copy of a "Stipulation as to return to writ of certiorari," filed in the above-entitled cause on the 28th day of June, A. D. 1921, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 28th day of June, A. D. 1921.

[SEAL.] F. D. MONCKTON,
Clerk.

By PAUL P. O'BRIEN,
Deputy Clerk.

79 United States Circuit Court of Appeals for the Ninth District.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
WESLEY L. SISCHO, DEFENDANT IN ERROR. } No. 3499.

Return to writ of certiorari.

By direction of the honorable the judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as clerk of said Court, in obedience to the annexed writ of certiorari issued out of the honorable the Supreme Court of the United States and addressed to the honorable the judges of the United States Cir-

cuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ and send to the said Supreme Court a certified copy of a "Stipulation as to return to writ of certiorari," in which said stipulation it is provided that the certified transcript of the record heretofore filed by the plaintiff in error in said cause in the said Supreme Court as a part of its petition for a writ of certiorari may be taken as the return to the said writ of certiorari, the original of which stipulation was filed in my office on the 28th day of June, A. D. 1921.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 28th day of June, A. D. 1921.

[SEAL.]

F. D. MONCKTON,
Clerk.

By PAUL P. O'BRIEN,
Deputy Clerk.

80 [Indorsed:] File No. 28,255. Supreme Court U. S. October term, 1921. Term No. 313. The United States of America, petitioner, vs. Wesley L. Sischo. Writ of certiorari and return. Filed July 6, 1921.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1922

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,
Petitioner,
v.
WESLEY L. SISCHO.

No. -----

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the United States, by William L. Frierson, its Solicitor General, and prays the court to issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause.

STATEMENT OF THE CASE.

On April 29, 1918, a complaint was filed in the United States District Court for the Western District of Washington, by the United States against Wesley L. Sischo, master of the launch "Nellie Evelyn," to recover $6,400 alleged to be due as a penalty under section 2809 R. S., section 5506, Comp. Stats., for failure to manifest certain merchandise, viz., 100 tins of opium prepared for smoking which opium had been brought into the United States from Canada by said Sischo (R. 1–3).

A general denial was filed (R. 5, 6), and testimony heard before the Court, a jury being waived (R. 6), but for the purposes of this petition it is only material to state that the District Judge held that Section 2809 R. S. did not apply to the case because the importation into this country of opium prepared for smoking was absolutely prohibited by the Act of February 9, 1909, c. 100 as amended by the Act of January 17, 1914, c. 9, 38 Stat. 275, Comp. Stats. Sect. 8800, and it could not, therefore, be "merchandise brought into the United States" within the meaning of Section 2809 R. S. which only applied to merchandise which might be subject to duty (R. 7–24; — Fed. —).

On writ of error (R. 41) the majority of the Court of Appeals, Judge Hunt dissenting, affirmed the judgment, on the sole ground that Section 2809 R. S. did not apply to the bringing in to this country of opium prepared for smoking (R. 56–67, —— Fed. ——).

STATUTES INVOLVED.

(1). 2806 R. S.:

> No merchandise shall be brought into the United States, from any foreign port, in any vessel unless the master has on board manifest in writing of the cargo, signed by such master.

(2). 2809 R. S.:

> If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a pen-

alty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited.

(3). Act of February 9, 1909, c. 100, Sect. 1:

After the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof; Provided, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.

Act of January 17, 1914, c. 9, Sect. 8:

Whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes.

QUESTION INVOLVED.

As indicated in the statement just made, the sole question involved is whether the bringing into this country of unmanifested opium prepared for smoking

imposes upon the master of the vessel in which it is brought the penalty prescribed by Section 2809 R. S., Section 5506 Comp. Stats.

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. It is strongly believed that the decision of the Court of Appeals for the Ninth Circuit in the present case is directly contrary on principle to decisions of the Court of Appeals for the Second Circuit, and perhaps to a decision of the Court of Appeals for the Eighth Circuit.

In *United States* v. *One Bag of Paradise Feathers*, 256 Fed. 301, a libel of forfeiture was filed under the provisions of Section 3082 R. S., Section 5785 Comp. Stats. which, in so far as material, provides:

> If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, * * * such merchandise shall be forfeited * * *.

The libel alleged that the seized paradise feathers had been brought into the United States "contrary to law," with in the meaning of Section 3082 R. S., supra, because the importation of such feathers into the United States was absolutely prohibited by Par. 347 of Schedule N of Section 1 of the Tariff Act of October 3, 1913, c. 16, 38 Stat. 148 Comp. Stats. Sect. 5291. The Court of Appeals for the Second Circuit held that Section 3082 R. S. applied to the case of goods or merchandise whose importation into the United States was wholly prohibited; and the Court also applied the rule as to burden of proof laid down in

Sect. III T of the Act of October 3, 1913, c. 16, Comp. Stats. Sect. 5791, which, in its terms, only applies to informations on seizures pursuant to any Act providing for or regulating the collection of duties on imports.

In *United States* v. *One Ford Automobile*, 262 Fed. 374, a libel was filed under Sections 3061 and 3062 R. S., Sections 5763 and 5764 Comp. Stats. to forfeit an automobile transporting whiskey from Canada into this country. Section 3061 R. S. authorizes search and seizure of vehicles on which it is suspected there is merchandise which has been introduced into the United States "in any manner contrary to law." The Court of Appeals for the Second Circuit held (a) that this was a customs statute and, therefore, it was not applicable to the importation of prohibited merchandise (262 Fed. 376); (b) that the Act prohibiting the importation of distilled spirits, viz, Act of August 10, 1917, c. 53, Sect. 15, 40 Stat. 282 Comp. Stats., Sect. 3115 1/8 1 provided an exclusive punishment for illegal importation of distilled spirits, viz, fine and imprisonment.

In *Feathers of Wild Birds* v. *United States*, 267 Fed. 964, a libel was filed under Section 3082 R. S. Sect. 5785 Comp. Stats. supra, under circumstances precisely similar to those in *United States* v. *One Bag of Paradise Feathers*, supra, viz, it was alleged that the feathers had been imported or brought into the United States "contrary to law" within the meaning of Section 3082 R. S. in that they had been brought in although their importation was wholly prohibited by Par. 347 of Schedule N of Section 3 of the Tariff Act

of October 3, 1913, c. 16. The Court of Appeals for the Second Circuit sustained the libel, confining the case of *United States* v. *One Ford Automobile*, supra, to point (b) above, viz, that the Act of August 10, 1917, c. 53, Sect. 15 provided an exclusive remedy. The reason for the decision was thus stated by the Court (267 Fed. 967):

> We think that, where goods forbidden of importation are physically brought into the country as such prohibited articles, they are in fact imported within the meaning of the Act just as truly as there may be an importation of lawful goods which may be imported contrary to law by failure to comply with the customs statute.

It should be observed that Section 3082 R. S. Section 5785 Comp. Stats. construed in the above case as applicable to articles whose importation is prohibited is contained in the same Title of the Revised Statutes as Sect. 2809 R. S. Section 5506 Comp. Stats. construed in the present case as not applicable to articles whose importation is prohibited, viz, Title 34, "Collection of Duties upon Imports," the only difference being that Sect. 2809 R. S. is in Chapter 4, "Entry of merchandise," while Section 3082 is in Chapter 10 "Enforcement of duty laws." Moreover, as stated above, the Court of Appeals for the Second Circuit, in both *United States* v. *One Bag of Paradise Feathers*, supra, and in *Feathers of Wild Birds* v. *United States*, supra, applied to articles whose importation is forbidden the provisions as to "probable cause" in

Sect. III T of the Act of October 3, 1913, c. 16, Comp. Stats. Sect. 5791 which refers to seizures made pursuant to Acts regulating the collection of duties.

It would seem to be clear, therefore, that the decisions of the Court of Appeals for the Second Circuit in *United States* v. *One Bag of Paradise Feathers*, and *Feathers of Wild Birds* v. *United States* are directly contrary to the decision of the Court of Appeals for the Ninth Circuit in the present case, and there is the authority of Judge Hunt to this effect for, in his dissently opinion in the present case, he said (R. 69 —— Fed. ——):

> Suppose a cargo of liquor is brought over, or a quantity of aigrette or osprey plumes, or skins of wild birds, none of which may lawfully be brought into the country, would not the statute defining merchandise include them? Or must the collectors of customs hold that because those articles are contraband they need not be put upon the manifest; that merely because they can not lawfully be imported they are not "merchandise," hence can not be brought into the country, and the master of the ship who brings them and has not included them in the manifest is not liable under section 2809? Such a construction seems to me to be too restrictive of the words of the statute.

The attention of the court is also called to the decision of the Court of Appeals for the Eighth Circuit in *Estes* v. *United States*, 227 Fed. 818. The defendant in that case was indicted for a violation of Sect. 3082 R. S. supra, for facilitating the transportation and concealment of cattle imported into the United

States from Mexico "contrary to law." It was held that it was "contrary to law," within the meaning of Section 3082 R. S., to bring cattle into this country from Mexico without inspection by an agent of the Bureau of Animal Industry of the Agricultural Department to see if they were diseased, as required by the Animal Quarantine Act of February 2, 1903, c. 349, Comp. Stats. Sect. 8699. Thus the Court of Appeals for the Eighth Circuit, like the Court of Appeals for the Second, seems to have laid down a rule contrary to that laid down by the Court of Appeals for the Ninth Circuit in the present case, as to the construction of the statute dealing with importing or bringing merchandise into this country and particularly as to whether such statutes apply at all to articles of merchandise whose importation into this country is wholly forbidden.

2. It is not necessary (we suppose) to labor the point that it is of very considerable importance to the public interests that the difference of opinion pointed out above should be reconciled, and a uniform rule laid down upon the subject. Until that is done, it is impossible for the public or the officials of the United States to know what penalties may be enforced or what steps may be taken to enforce them in the case of the actual bringing in to this country of goods or merchandise whose importation is prohibited.

WILLIAM L. FRIERSON,
Solicitor General.

APRIL, 1921.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

UNITED STATES OF AMERICA, PETITIONER,
v.
WESLEY L. SISCHO. } No. 313.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the petitioner in the above-entitled cause, and respectfully moves the court to advance said cause for argument on a date not earlier than the first Monday of February, 1922, or as soon thereafter as convenient.

This is a case in which the United States are concerned, which also involves a matter of general public interest, viz, whether or not the various provisions of the customs laws of the United States are applicable to the importation into this country of articles whose importation has been absolutely prohibited by law. It is claimed that the decision of the Court of Appeals for the Ninth Circuit in the case at bar is contrary to the decisions of the Courts of Appeal for the Second and Eighth Circuits, and it is important, in the ad-

ministration of the laws of the United States relating to the importation of prohibited articles, to have the law settled by this court.

JAMES M. BECK,
Solicitor General.

December, 1921.

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AUTHORITIES:

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

UNITED STATES OF AMERICA, Petitioner, *against* WESLEY L. SISCHO.	No. 313.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF SUBMITTED BY CLETUS KEATING, COUNSEL FOR DEFENDANT-IN-ERROR IN THE CASE OF UNITED STATES OF AMERICA, PLAINTIFF-IN-ERROR, AGAINST JOHN REED, DEFENDANT-IN-ERROR, NOW ON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AMICUS CURIAE.

STATEMENT OF THE CASE.

On April 29, 1918, the United States filed a complaint in the District Court of the United States for

the Western District of Washington, under section 5803 Compiled Statutes, 1918, against WESLEY L. SISCHO, master and owner of the gasoline launch *Nellie Evelyn*, to recover a penalty of $6400. claimed to be due under Section 2809 Revised Statutes, for failure to manifest certain alleged merchandise, to wit: 100 tins of smoking opium brought into the United States in his launch by the defendant (*R., pp. 1 and 2*).

Upon a general denial being filed, the case was tried before Judge Cushman, a jury having been waived.

The record is barren of the evidence offered on the trial and even Exhibit #1 introduced on the trial, does not appear in the record (*Record, p. 4*).

The District Court entered judgment against the United States (*R., p. 19*). Judge Cushman in a carefully considered opinion (*R., pp. 4-19*) 262 Fed. 1001, held that smoking opium, the importation of which is absolutely prohibited, was not "merchandise" within the meaning of the Revised Statutes which defines "merchandise" (Sec. 2766) as "goods, wares and chattels of every description capable of being imported" and hence there was no duty on the master to include it in the cargo manifest under R. S. 2809.

The District Court further held that as the importation and sale of smoking opium are absolutely prohibited under any circumstances, it could have no market value in the United States; that the smoking opium having no market value, the United States could not, in any event, collect a penalty under section 2809, which provided "the master shall be liable to a penalty equal in value of such merchandise not included in such manifest."

The only evidence offered on the question of the value of the opium was that Sischo had paid $6400. for the opium in British Columbia (*Record, p. 20*). Traffic in smoking opium is also prohibited in British Columbia (*Record, p. 14*).

On a writ of error to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the District Court was affirmed, Judge Hunt dissenting (*R., pp. 29-38*), 270 Fed. 958.

Thereafter this writ of certiorari was granted on the application of the United States which alleged that the decision of the Court of Appeals for the Ninth Circuit was contrary in effect to the decision of the Court of Appeals for the Second Circuit in *Feathers of Wild Birds* vs. *United States*, 267 Fed. 964, and of the Court of Appeals for the Eighth Circuit in *Estes* vs. *United States*, 227 Fed. 818.

Questions Involved in the Case.

The three principal questions involved in the case are:

(1) Whether smoking opium, the importation of which is absolutely prohibited under serious penalties by the Opium Act, is "merchandise" within the meaning of the Revised Statutes, which define "merchandise" (Section 2766 R. S.) as "goods, wares and chattels of every description capable of being imported."

(2) Assuming that smoking opium is "merchandise" within the meaning of the Revised Statutes, was not section 2809 of the Revised Statutes requiring the

manifesting of "merchandise" repealed by the Opium Act in so far as smoking opium is concerned?

(3) Can Sischo be held liable for $6400 under Section 2809, which provides that "the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest," when smoking opium has not any market value in the United States or British Columbia where it was obtained.

FIRST POINT.

SMOKING OPIUM IS NOT "MERCHANDISE" WITHIN THE MEANING OF THE REVISED STATUTES AND THEREFORE SISCHO WAS NOT REQUIRED TO INCLUDE OR DESCRIBE IT IN THE MANIFEST.

There are three kinds of manifests provided for by law—one for cargo, R. S. Section 2806; one for passengers, R. S. Section 2807, paragraph 5, and one for sea stores, R. S. Section 2807, paragraph 6.

The Government seeks to recover a penalty under section 2809 for failure to include 100 five-tael tins of smoking opium on the cargo manifest of the *Nellie Evelyn*.

Section 2806 of the Revised Statutes prohibits the bringing in of any "merchandise" from any foreign port into the United States by any vessel unless the master has on board manifests in writing of the cargo, signed by such master.

Sections 2807 and 2808 provide what the manifest shall contain and how the "merchandise" destined to be

delivered at different districts or ports, shall be listed and arranged thereon.

Section 2809, which is the basis of the Government's alleged cause of action, provides as follows:

> "If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers or crew of such vessel, shall be forfeited."

Section 2766 of the Revised Statutes, defines "*merchandise*" as follows:

> "The word 'merchandise' as used in this Title (R. S. 2517-3129) may include goods, wares and chattels of every description capable of being imported."

Under the Acts of Congress of February 9, 1909, and January 17, 1914, commonly known as the Opium Act, the *importation* of smoking opium, or opium prepared for smoking, is absolutely prohibited under severe penalties. It is a little difficult to understand, therefore, how smoking opium can be brought within the definition of "merchandise" under Section 2766 of the Revised Statutes, which says that "merchandise" shall consist of goods, wares and chattels "capable of being imported."

If smoking opium is not "capable of being imported," it is obviously not "merchandise" within the meaning of the Statute.

Such was the holding of the District Court and of the Circuit Court of Appeals. The same result was reached by the District Court of the Eastern District of New York in *United States* vs. *John Reed,* 274 Fed. 724.

The case under this point presents a pure question of statutory construction as to the meaning of the word "merchandise" when defined as "goods, wares and chattels of every description capable of being imported."

The cases cited by the Government under Statutes which do not so define "merchandise" do not throw any light on the problem.

United States vs. *Thomas,* 4 Ben. 370, 373-375, cited at pages 9 and 16 of the Government's brief, was an indictment for smuggling nutmegs and was brought under the Act of July 18, 1866, which Act did not define "merchandise" as goods, wares and chattels *"capable of being imported."* The importation of nutmegs was not forbidden.

United States vs. *Claflin,* 13 Blatch. 178, 186, cited by the Government at pp. 9 and 16 of its brief, was an indictment for smuggling silk and was also brought under the Act of July 18, 1866 which did not define "merchandise." The importation of silk was not forbidden.

United States vs. *Kee Ho,* 33 Fed. 333, cited by the Government at pp. 9 and 16 of its brief, was also brought under the Act of July 18, 1866. In this case there was an indictment for smuggling smoking opium. At the time this case arose, the Opium Acts had not been passed

and it was not unlawful to import opium unless the importer was a Chinese. There was no question of the meaning of "merchandise" involved in this case at all.

In *Estes* vs. *United States,* 227 Fed. 818, cited at pp. 2 and 10 of the Government's brief, and on which the Government relied on its application for a writ of certiorari in this case, cattle were imported into the United States without first being inspected as required by regulations of the Department of Agriculture.

The case has no bearing whatsoever on the meaning of the words "capable of being imported" because the cattle were "capable of being imported" and the prosecution was for importing them without complying with the law with respect to inspection.

Daigle vs. *United States,* 237 Fed. 159, cited at pp. 11 and 21 of the Government's brief, was a case somewhat similar to *Estes* vs. *United States.* It did not involve any question with respect to the meaning of "merchandise" as defined by section 2766. The case instead of supporting the Government's contention, is directly opposed to it.

In the third count of the indictment, the Government alleged that certain potatoes were illegally imported into the United States contrary to law in that they were brought in without offering them to a Customs Officer for inspection. The Government sought to support the indictment under sections 3082 and 3097 of the Revised Statutes.

The Court, however, held that under the provisions of section 3097 merchandise of which entry must be made, is *"merchandise subject to duties"* and as the potatoes in question were not *"merchandise subject to duty"* the failure to make entry of them was not a viola-

tion of the provisions of that section. The Court, however, held the defendant for a breach of section 3100 of the Revised Statutes, because importation was forbidden and the goods had not been unladen in the presence of, or inspected by an inspector or officer of the Customs of the said United States at the first port of entry or Custom House where the merchandise had arrived.

Section 3100, however, deals with "all merchandise and all baggage and effects of passengers and *all other articles* imported into the United States" an express recognition by Congress of the limitation it had placed on the word merchandise.

It will be seen from the quotation just given that Section 3100 is not limited to "merchandise" as defined by Section 2766, but is of more general application and applies as well to "all baggage and effects of passengers and *all other articles* imported into the United States."

In *Feathers of Wild Birds* vs. *United States* (cited at pp. 2 and 13 of the Government's brief), 267 Fed. 964, the sole question involved was whether goods forbidden of importation but nevertheless brought into the country, were subject to forfeiture. There was no question involved in this case as to the meaning of the word "merchandise" as defined by Section 2766 of the Revised Statutes. It only involved the question of whether the feathers were forfeitable as having been brought into the country contrary to law.

The case of *Harford* vs. *United States,* 8 Cranch 109, cited at pages 13 and 21 of the Government's brief and on which the Government states at p. 21, it mainly relies, was a case brought under the Act of March 2, 1799

for forfeiture of certain goods, the character of which does not appear. The opinion states:

> "The principal question in this case is, whether goods and merchandise, the importation of which into the United States was prohibited by the Act of 18th of April, 1806, vol. 8, p. 80, were within the purview of the 50th Section of the Act of 2nd of March, 1799, vol. 4, p. 360, so that the unlading of them without a permit, etc. was an offense subjecting them to forfeiture."

The Act of March 2, 1799, provided: "no goods, wares or merchandise shall be unladen without a permit." In the Act of March 2, 1799, "merchandise" was not defined as "goods, wares and chattels *capable of being imported.*"

It is not disputed that smoking opium would be "goods, wares and chattels," but it is disputed that smoking opium could be goods, wares and chattels *capable of being imported* in view of the Opium Act.

The definition of "merchandise" as goods, wares and chattels "capable of being imported," first appeared in Section 2766 of the Revised Statutes enacted June 22, 1874. Previous to that the word "merchandise" had not been limited by the words "capable of being imported." Although sixty-eight years have passed since the enactment of the present statute the Government has been unable to cite a single case which supports its present contention.

Section 3082 of the Revised Statutes, the general smuggling statute, and Acts of Feb. 9, 1909, and Jan. 17, 1914, the smoking opium smuggling statutes, make pro-

vision not only for imprisonment and fine, but forfeiture as well, and the record shows in this case that the boat in which the opium was brought into the country, and the opium as well were forfeited and the defendant sentenced to a jail term.

A holding here that it is necessary for a master to manifest smoking opium, would be a serious hardship on innocent persons. In *United States* vs. *John Reed,* United States District Court, Eastern District of New York, 274 Fed. 724, now on writ of error to the Circuit Court of Appeals for the Second Circuit, the Government brought an action similar to the one here against the master of the *S.S. Royal Prince.* The Government conceded that Reed was innocent of all wrong doing and had no knowledge or means of knowledge that the opium had been secreted by certain members of his crew on their persons. To hold in the Reed case that it was Reed's duty to manifest the opium, would be in fact a holding that Reed would have had to discover a crime by one of his crew and then make the crime his own by putting the opium on the ship's manifest, a thing expressly forbidden under serious penalty by the Opium Act.

It has already been shown that there are ample remedies open to the Government to punish smugglers and to forfeit the goods attempted to be smuggled. It is submitted that the meaning of the statutes should not be stretched so as to inflict a civil penalty on an innocent master for failure to include in his manifest certain goods whose importation is forbidden under serious penalties and concerning which he knew nothing.

Unless the words "capable of being imported" are given the meaning here contended for, they do not add anything whatsoever to the words "goods, wares and chattels."

That Congress plainly intended to limit "merchandise" to goods, wares and chattels *capable of being imported* is shown by the use of other words in other parts of the Statutes.

Section 2537 refers to "all cargoes chargeable with duties."

Section 2795 refers to "articles."

Section 3074 refers to "property" subject to forfeiture.

Sections 3074 and 3077 refer also to "property."

Section 3076 refers to "property" and "articles."

Section 3086 refers to "merchandise" or "property of any kind."

Sections 3100-3102 refer to "all merchandise" "all baggage and effects of passengers and all other articles."

It is submitted that the decision of the District Court and of the Circuit Court of Appeals on this point should be affirmed.

SECOND POINT.

ASSUMING THAT SMOKING OPIUM IS "MERCHANDISE" WITHIN THE MEANING OF THE REVISED STATUTES, THE PROVISIONS OF SECTION 2809 WERE REPEALED BY THE OPIUM ACT IN SO FAR AS SMOKING OPIUM IS CONCERNED.

The Acts of Congress of February 9, 1909 and January 17, 1914, commonly known as the Opium Acts, Section 1, make it unlawful under any circumstances to import into the United States smoking opium or opium prepared for smoking.

Section 2 of the Opium Act provides that "any person who shall fraudulently or knowingly bring into the United States or assist in so doing, any opium contrary to law, or shall receive, conceal, buy or sell, or in any manner facilitate the transportation, concealment or sale of such opium, shall be fined a sum not exceeding $5000. or be imprisoned for two years or both".

Section 4 provides that any person who shall receive or have in his possession, conceal on board of or transport on any foreign or domestic vessel, destined to or bound from the United States, any smoking opium or opium prepared for smoking, shall be subject to the penalty provided in section 2.

Section 5 provides that no smoking opium or opium prepared for smoking shall be admitted into the United States for transportation to another country nor shall it be transported or transhipped from one vessel to another vessel within any waters of the United States for immediate exportation or any other purpose.

It sems hardly conceivable that Congress could have intended to prohibit absolutely the importation of smoking opium and to make it a crime to have it in one's possession or transport it on a vessel bound to or from the United States, and, at the same time, leave standing Section 2809, which would require of the master, assuming that smoking opium is "merchandise", that he place the same on the manifest, which action on his part would be criminal under the Opium Act.

The situation is quite analogous to that which was passed on by the Supreme Court in *United States* vs. *Boze Yuginovich*, decided June 1, 1921. There the defendants were indicted for violation of the Internal Revenue Laws. The first count charged the defendants with unlawfully engaging in the business of distillers within the intent and meaning of the Internal Revenue Laws of the United States, and that they distilled spirits subject to the Internal Revenue Tax imposed by the laws of the United States, and defrauded and attempted to defraud the United States of the tax on said spirits. The second count, based on Section 3279 charged the defendants with failing to keep on the distillery conducted by them, any sign exhibiting the name or firm of the distiller with the words "Registered Distillery" as required by Statute. The third count charged the defendants with carrying on the business of distilling without giving a bond as required by law. The fourth count charged the defendants with unlawfully making a mash, fit for distillation, in a building not a distillery duly authorized by law.

The defendants apparently operated a moonshine still.

The defendants interposed a motion to quash the indictment and filed a demurrer on the ground that the Acts of Congress under which the indictments were found, were repealed by the Volstead Act.

The Court affirmed the judgment of the Court below, quashing the indictment and sustaining the demurrer.

Mr. Justice Day said:

> "We agree with the Court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in Section 3257 in addition to the specific provision for punishment made in the Volstead Act.
>
> "We have less difficulty with the other sections of the prior revenue legislation under which the charges already set forth, are made. We think it was not intended to keep on foot the requirement as to displaying the words: 'Registered Distillery' in a place intended for the production of liquor for beverage purposes which could not longer be lawfully conducted; nor to require a bond for the control of such production; nor to penalize the making of mash in a distillery which could not be authorized by law."

The application of the *Yuginovich* case here contended for, was adopted by the United States District Court for the Eastern District of New York, in *United States* vs. *John Reed,* 274 Fed. 225-227.

We submit that it could not have been the intention of Congress to keep on foot the requirement of includ-

ing in a manifest smoking opium which could be no longer imported under any circumstances.

THIRD POINT.

IN ANY EVENT THE UNITED STATES FAILED TO PROVE THE VALUE OF THE OPIUM AND HENCE IS NOT ENTITLED TO RECOVER THE PENALTY PROVIDED FOR IN SECTION 2809.

Section 2809, which is quoted at page 5 of this brief, provides that "the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest."

It was therefore part of the Government's case to prove the value of the smoking opium at the time of its arrival in the United States.

The only proof adduced by the Government on this point was that the master had paid $6400. for it in British Columbia (*R., p. 20*).

As the importation of smoking opium is absolutely prohibited, and its sale forbidden in the United States under any circumstances, it cannot have any market value here. It can scarcely be contended that because there may be some illicit dealings in smoking opium in this country, that the price paid in such criminal dealings, can be the basis of fixing the value necessary in order to determine the penalty provided for by section 2809. Even if such evidence were competent the Government did not produce it.

In fact, the Revised Statutes provide that the market price at the first port or district where landed, shall govern the amount of any penalty.

Section 2872 of the Revised Statutes provides that no "merchandise" brought in on any vessel shall be unladen except in open day and not at any time without a permit from the Collector.

Section 2874 of the Revised Statutes provides as follows:

> "All merchandise, so unladen or delivered contrary to the provisions of Section 2872, shall become forfeited, and may be seized by any of the officers of the Customs; and where the value thereof, according to the highest market price of the same at the port or district where landed, shall amount to $400. the vessel, tackle, apparel, and furniture, shall be subject to like forfeiture and seizure."

We think it fairly appears from the foregoing that Congress in dealing with breaches of the Revenue Laws with respect to receipt and delivery of "merchandise" for which it provided penalties of various kinds, intended that the value of the merchandise, where it was material, should be determined by the market value at the port or district where landed.

It would not be fair to assume that Congress intended to have the penalty provided for in section 2874 determined by the market value of the "merchandise" at the port or district where landed and have the penalty provided for in section 2809, both of which are part of the same Act, determined by the value of the "merchandise" at some other place.

The Government offered no evidence whatsoever with respect to the market value of the smoking opium at the port or district where landed. In view of the prohibition against the import and sale of smoking opium under any circumstances whatsoever, the Government, of course, could not have offered any evidence as to market value at the port or district where landed.

As pointed out, the only evidence of value is what the master paid for it in British Columbia. The sale of smoking opium is also forbidden in British Columbia. (R., p. 14). It is impossible, therefore, on any theory of the case, to place a value on the smoking opium which would not be based solely on the result of an illicit sale.

LAST POINT.

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

CLETUS KEATING,
(Counsel for Defendant-in-Error in the case of United States, Plaintiff-in-Error, against John Reed, Defendant-in-Error, now on Writ of Error to the Circuit Court of Appeals for the Second Circuit),
Amicus Curiae.

INDEX.

CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA, petitioner,
v.
WESLEY L. SISCHO.

No. ——.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

On April 29, 1918, the United States filed a complaint in the District Court for the Western District of Washington against Wesley L. Sischo, master of the gasoline launch *Nellie Evelyn*, to recover a penalty of $6,400 which was alleged to be due under section 2809, Revised Statutes, section 5506, Compiled Statutes, for failure to manifest certain merchandise, viz, 100 tins of opium prepared for smoking, which opium, it was alleged, had been brought into the United States by the said defendant. (R. 1, 2.) A general denial was filed (R. 3, 4), and the case was tried to the

court. (R. 4.) The bill of exceptions (R. 19–21) states that the United States offered evidence tending to prove all the allegations of the complaint, and also offered certain evidence as to the value of the opium, and particularly offered evidence of the admission by the defendant that he had paid $6,400 for the opium in Canada. (R. 20.) The district court entered judgment against the United States (R. 19) on the grounds stated in an elaborate opinion (R. 4–19, 262 Fed. 1001), viz, that section 2809 of the Revised Statutes did not apply to an article, like opium prepared for smoking, whose importation into this country was absolutely prohibited, nor to an article, like opium prepared for smoking, whose value could not possibly be ascertained since there was and could be no market for it. On writ of error, the majority of the Court of Appeals, Judge Hunt dissenting, affirmed the judgment on the sole ground that section 2809 of the Revised Statutes does not apply to an article whose importation into this country is prohibited. (R. 29–38, 270 Fed. 958.)

Thereupon this writ of certiorari was granted on application of the United States, which alleged that the decision of the Court of Appeals for the Ninth Circuit was contrary, in effect, to the decision of the Court of Appeals for the Second Circuit in *Feathers of Wild Birds* v. *United States*, 267 Fed. 964, and of the Court of Appeals for the Eighth Circuit in *Estes* v. *United States*, 227 Fed. 818.

No merchandise shall be brought into the United States, from any foreign port, in any vessel unless the master has on board manifests in writing of the cargo, signed by such master. (Sec. 2806, R. S.)

Every manifest required by the preceding section shall contain:

First. The name of the ports where the merchandise in such manifest mentioned were taken on board, and the ports within the United States for which the same are destined; particularly noting the merchandise destined for each port respectively: *Provided, however*, That the master of a vessel laden exclusively either with sugar, coal, salt, hides, dyewoods, wool or jute butts, consigned to one consignee, arriving at a port for orders, may be permitted to destine such cargo or determine its disposition "for orders," upon entering the vessel at the customhouse, and, within fifteen days afterward and before the unloading of any part of the cargo, to amend the manifest by designating the actual port of discharge of such cargo: *Provided, further*, That in the event of failure to designate the port of discharge within fifteen days such cargo must be discharged at the port where the vessel entered.

Second. The name, description, and build of the vessel; the true admeasurement or tonnage thereof; the port to which such vessel belongs; the name of each owner, according to the register of the same; and the name of the master of such vessel.

Third. A just and particular account of all the merchandise, so laden on board, whether in packages or stowed loose, of any kind or nature whatever, together with the marks and numbers as marked on each package, and the number or quantity and description of the packages in words at length, whether leaguer, pipe, butt, puncheon, hogshead, barrel, keg, case, bale, pack, truss, chest, box, bandbox, bundle, parcel cask, or package, of any kind or sort, describing the same by its usual name or denomination.

Fourth. The names of the persons to whom such packages are respectively consigned, agreeably to the bills of lading signed for the same, unless when the goods are consigned to order, when it shall be so expressed in the manifest.

Fifth. The names of the several passengers on board the vessel, distinguishing whether cabin or steerage passengers, or both, with their baggage, specifying the number and description of packages belonging to each respectively.

Sixth. An account of the sea stores remaining, if any.

(Sec. 2807, R. S., amended June 3, 1892, c. 86, sec. 1, 27 Stat. 41.)

If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and

all such merchandise not included in the manifest belonging or consigned to the master, mate, officers or crew of such vessel, shall be forfeited. (Sec. 2809, R. S.)

The word "merchandise," as used in this title, may include goods, wares, and chattels of every description capable of being imported. (Sec. 2766, R. S.)

Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the act of January 17, 1914, c. 9, 38 Stat. 275:

That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: *Provided*, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law. * * *

SEC. 6. That hereafter it shall be unlawful for any person subject to the jurisdiction of the United States to export or cause to be exported from the United States, or from territory under its control or jurisdiction, or from countries in which the United States exercises extraterritorial jurisdiction, any opium or cocaine, or any salt, derivative, or preparation of opium or cocaine, to any other country; * * *.

SEC. 8. That whenever opium or cocaine or any preparation or derivatives thereof shall

be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes.

QUESTION INVOLVED.

The main question involved in the case at bar is whether or not opium prepared for smoking, whose importation into this country is absolutely prohibited by section 1 of the act of February 9, 1909, c. 100, as amended by the act of January 17, 1914, c. 9, is, if actually brought into this country, without inclusion in a manifest, within the provisions of section 2809, Revised Statutes, as being "merchandise" "brought into the United States," and not included or described in "the manifest."

ARGUMENT.

I.

Opium prepared for smoking, though its importation be prohibited, is within the letter and spirit of section 2809, R. S.

The decision of the Court of Appeals for the Ninth Circuit must be rested upon a limited meaning given to one or all of three expressions in the language of the statute:

(1) The word "merchandise."
(2) The words "brought into the United States."
(3) The word "manifest."

There can be no doubt that the case at bar falls within the provisions of section 2809 unless it be excluded therefrom by the meaning attached to the three expressions referred to above. They will therefore be considered in their order:

(1) The word "merchandise" means nothing else than personal property which is the subject of sale or barter. Even that meaning may be too limited for application to the customs revenue laws, since it was held in the case of *United States* v. *Chesebrough*, 176 Fed. 778, 781, 782, that the word "merchandise" included articles brought in the passenger's baggage and not intended for sale, and this was also held in *Von Catzhausen* v. *Nazro*, 15 Fed. 891, 898.

The theory of the district judge and of the majority of the Court of Appeals in the present case was that an article lost its quality of "merchandise" if its importation into the commerce of this country was absolutely prohibited, and this theory was supported by the court partly by the language of section 2766, Revised Statutes, which provides that the word "merchandise" as used in the customs revenue statutes "may include goods, wares, and chattels of every description capable of being imported," the lower courts being of the opinion that the words "capable of being imported" mean legally capable of being imported. It is submitted, however, that this limited meaning of the word "merchandise" can not be fairly adopted. The fact that the importation of an article which would otherwise be undoubtedly "merchandise" is prohibited, and that this prohibition is sanctioned

by a penalty upon the person importing it or selling it after importation, can not change the actual nature of the article itself, which is the important thing in the view of the statutes. Congress realized, and this court realizes, that, in spite of the prohibition, the article may be physically brought into this country for sale, and may be sold thereafter, the person bringing it in being willing to take the risk of the punishment which may be inflicted upon him. The very fact that the statute which prohibits the importation of opium also prohibits the concealing of it after its importation or the facilitating of its transportation shows that Congress perceived that the opium might in fact be imported or brought into this country, and, when so imported or brought in, would necessarily be "merchandise" within the meaning of the statutes.

If it be said that articles whose importation is prohibited are not on that account "merchandise," it would seem that the principle would have to be extended also to the importation of articles without paying the duties thereon, or without complying with other provisions of the customs revenue laws. It could not be possibly said that articles which were fraudulently brought into the country without the payment of duties were not merchandise on account of their unlawful importation, and yet the bringing of them in in that manner is punished and subjects the goods to forfeiture. They are not "legally capable of being imported" any more than articles whose importation is prohibited, since they can only be

legally imported by payment of the duties, a condition which has not been performed.

The authorities to the effect that prohibited articles are none the less "merchandise" seem to be clear. Section 3082 of the Revised Statutes provides that, if any person shall fraudulently or knowingly import or bring into the United States any *merchandise*, contrary to law, he shall be punished and the merchandise forfeited. In *United States* v. *Thomas*, 4 Ben. 370, 373–375, Fed. Cas. No. 16473, it was held that this section did not apply at all to goods imported without the payment of duties, but applied only to goods imported in a manner or form contrary to law, or whose importation was altogether forbidden, thus expressly holding that goods whose importation was forbidden were nevertheless "merchandise" within the meaning of section 3082, Revised Statutes. A ruling to precisely the same effect was made in *United States* v. *Claflin*, 13 Blatch. 178, 186, Fed. Cas. No. 14798. In *United States* v. *Kee Ho*, 33 Fed. 333, 335, Judge Deady said of section 3082, Revised Statutes:

> The section of the statute under which this indictment is drawn is intended, as the title of the act from which it is compiled indicates, to prevent smuggling, or clandestine introduction of goods into the United States without passing them through the customhouse, and with intent to defraud the revenue of the United States. But its language is broad enough to include, and does include, every case or form of illegal importation, even where

the intent to avoid the payment of duties does not exist, as the bringing in of prohibited goods or goods packed in prohibited methods.

In *United States* v. *Merriam*, 13 Int. Rev. Rec. 11, 26 Fed. Cas. pp. 1237, 1239, Judge Longyear doubted the construction of section 3082, Revised Statutes, as not extending to goods imported without payment of the duty, but he did not in the least intimate any doubt that the section extended to goods whose importation was prohibited.

In *Estes* v. *United States*, 227 Fed. 818, it appeared that the Secretary of Agriculture had made a regulation, under the animal quarantine act, to the effect that no cattle should be imported into the United States from the Republic of Mexico without inspection by an inspector of the Bureau of Animal Industry and a finding that they were free from disease. The defendants had imported certain cattle into this country (such cattle not being dutiable under the customs laws) without the requisite inspection, and they were indicted for a violation of section 3100, Revised Statutes, which prohibits the importation of merchandise and all other articles without inspection by an officer of the customs, and of section 3082, Revised Statutes referred to above. It was held that both sections had been violated, that is, that such cattle, although prohibited from importation into this country without inspection under the quarantine act, were nevertheless "merchandise" imported into this country, if the owners thereof succeeded in avoiding the quarantine inspectors.

In *Daigle* v. *United States*, 237 Fed. 159, 163, 165, it appeared that the Secretary of Agriculture had promulgated a quarantine against potatoes from Canada, and certain potatoes were libeled for a violation of section 3082, Revised Statutes, and 3100, Revised Statutes, referred to above, in that they had been imported from Canada, contrary to law, and without inspection by the customs inspectors. The Court of Appeals for the First Circuit held that, if the libel had alleged that the goods had been knowingly brought into the United States contrary to law because their importation was prohibited under the order of the Secretary of Agriculture, there would be little doubt that the potatoes would be subject to seizure and condemnation under section 3082, Revised Statutes, holding, however, that this section was not applicable on account of the lack of the necessary allegations in the libel. The Court of Appeals went on to hold that the importation, nevertheless, under the circumstances, was a violation of section 3100, Revised Statutes, the court saying:

> But the contention is made that the potatoes here in question were not subjects of import even as nondutiable articles, for their importation was prohibited under the plant quarantine act and the order of the Secretary of Agriculture, and the question is whether the provisions of section 3100 apply to merchandise the importation of which is prohibited, and require that it, on being brought "into the United States from any contiguous foreign

country, * * * shall be unladen in the presence of, and be inspected by, an inspector or other officer of * * * customs at the first port of entry or customhouse in the United States where the same shall arrive." Although merchandise the importation of which is expressly prohibited can not lawfully be imported, it does not follow that its introduction into the country will not also be contrary to the provisions of section 3100 if not submitted for inspection, so that it may be excluded. The provisions of section 3100 are broad in their terms. They contemplate that "all merchandise, and all baggage and effects of passengers, and all other articles imported into the United States from any contiguous foreign country" shall be subjected to inspection at the first port of entry or customhouse in the United States where the same shall arrive, with the single exception provided for in section 3102 (Comp. St. 1913, sec 5814), which has nothing to do with this case.

We are therefore of the opinion that all merchandise introduced into this country from Canada, whether subject to duty, free from duty, or the importation of which is prohibited, is introduced in violation of law if not submitted for inspection as required by section 3100, and that the District Court was right in ruling that the plant quarantine act and the order of the Secretary of Agriculture did not constitute a defense to the libel as applied to the fourth count.

In *Feathers of Wild Birds* v. *United States*, 267 Fed. 964, section 3082, Revised Statutes, was expressly applied to articles whose importation into this country is absolutely prohibited, the Court of Appeals for the Second Circuit saying:

> We think that, where goods forbidden of importation are physically brought into the country as such prohibited articles, they are in fact imported within the meaning of the act just as truly as there may be an importation of lawful goods which may be imported contrary to law by failure to comply with the customs statute.

The most important decision, however, upon the subject, and one which seems to be decisive of the case at bar in all its aspects, is the unanimous opinion of this court, delivered by Mr. Justice Story, in the case of *Harford* v. *United States*, 8 Cranch, 109. As the opinion is short, it is quoted in full:

> The principal question in this case is whether goods and merchandize, the importation of which into the United States was prohibited by the act of *18th of April*, 1806, *vol.* 8, *p.* 80, were within the purview of the *50th section of the collection act of 2d of March*, 1799, *vol.* 4, *p.* 360, so that the unlading of them without a permit, etc., was an offence subjecting them to forfeiture.
>
> It has been contended on behalf of the claimant that they were not within the purview of the 50th section, because that section applies only to goods, wares, and merchandize, the importation of which is lawful. To this con-

struction the court can not yield assent. The language of the 50th section is, that "no goods, wares, or merchandize, etc., shall be unladen, etc., without a permit;" it is therefore broad enough to cover all goods, whether lawful or unlawful. The case, being then within the letter, can be extracted from forfeiture only by showing that it is not within the spirit of the section. To us it seems clear that the case is within the policy and mischief of the collection act, since the necessity of a permit is some check upon unlawful importations, and is one reason why it is required. The act of 1806 does not profess to repeal the 50th section of the collection act as to the prohibited goods, and a repeal by implication ought not to be presumed unless from the repugnance of the provisions the inference be necessary and unavoidable. No such manifest repugnance appears to the court. The provisions may well stand together and indeed serve as mutual aids.

In fact the very point now presented was decided by this court in the case of *Locke, claimant*, v. *The United States*, at February term 1813.

It will be seen that the court in this opinion distinctly holds that articles whose importation into this country is absolutely prohibited are, nevertheless, "goods, wares, and merchandise" within the meaning of the customs revenue acts.

It is submitted, therefore, both on principle and authority, that the word "merchandise" in section 2809, Revised Statutes, can not be limited, either by

reason of its ordinary meaning, or by reason of the provisions of section 2766, Revised Statutes, so as to exclude from its scope articles whose importation into this country is absolutely prohibited.

(2) The next question is whether or not, where articles whose importation into this country is absolutely prohibited are nevertheless physically brought within the territorial limits of this country, they can be said to have been "brought into" this country within the meaning of section 2809, Revised Statutes.

Of this it would seem there can be no doubt. The statutes generally use the word "import," and it would seem that clearly the words "brought into" are added to the word "imported" so as to broaden its meaning and include cases where a technical importation might be said not to have taken place. The word "importation" as used in the customs revenue laws is thus defined by this court in *Arnold* v. *United States*, 9 Cranch 104, 120:

> It is further contended that the importation was complete by the arrival of the vessel within the jurisdictional limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district but also within the limits of some port of entry.

It will be observed that nothing is said in this decision as to the character of the articles being material; that is, whether they are articles whose importation is forbidden or not.

In the cases referred to above, namely, *United States* v. *Thomas*, *United States* v. *Claflin*, and *United States* v. *Kee Ho*, it was held that there could be an "importation" of prohibited articles within the limited meaning of that word as used in the customs revenue statutes. In the case of *The Schooner Boston*, 1 Gallison 239, Fed. Cas. No. 1670, it appeared that the schooner came into the port of Boston having on board certain goods whose importation into this country was absolutely prohibited under the President's proclamation made pursuant to the embargo act. It was claimed that the vessel had come into the port of Boston merely to find out whether the goods could be lawfully brought into this country or not and that, after finding that they could not be lawfully imported, the destination of the vessel had been changed to a foreign country. Mr. Justice Story held, nevertheless, that this was an importation into the United States, and that the vessel and the cargo were subject to forfeiture. After pointing out expressly that the importation of these goods was absolutely prohibited, Justice Story said:

> The cargo was taken on board with the intention to be imported, and was actually imported into the United States.

If the physical bringing into this country of prohibited articles may be (as the authorities above show

it is) an "importation," it follows *a fortiori* that such a physical transportation of the prohibited articles into this country would constitute a bringing in of them within the meaning of sections 2806 and 2809, Revised Statutes. The words "bring into" or "brought into" are evidently broader words than "import into," and must have been used by Congress for the very purpose of covering the illegal transportation of goods into this country where a technical importation into a port of entry has not taken place.

(3) The third question involved in the case at bar, viz, whether there is any duty to "manifest" prohibited articles within the meaning of section 2809, Revised Statutes, is (we agree) more difficult. Yet it would seem that here, too, the manifesting of prohibited articles is within both the letter and spirit of sections 2806 and 2809, Revised Statutes.

The word "manifest" is apparently a somewhat modern one. In Lord Hale's *Treatise Concerning the Customs* (Hargrave's Law Tracts, pp. 219, 220,) it is said that the master is obliged to give an account to the revenue authorities of the goods under his charge, and to make a just and true entry of certain matters, which, it seems to be supposed, he will obtain from the bills-of-lading. In the Oxford dictionary the following definition of the word "manifest" is given:

> The list of the ship's cargo, signed by the master, for the information and use of the officers of customs.

The first citation of the word, however, with this meaning appears to be in 1744, and an earlier citation of it in 1706 reads as though the manifest was merely a draft of the cargo, showing what is due for freight. At any rate, the modern meaning of it, as used in the customs revenue acts, is undoubtedly that given in the Oxford dictionary, viz, a list of the ship's cargo for the information and use of the officers of customs.

The contents of the manifest are prescribed in great detail in section 2807 of the Revised Statutes as amended. The third paragraph (being the important one to the case at bar) provides that the manifest shall contain

> "A just and particular account of all the merchandise, so laden on board" (that is, laden on board in a foreign port), "whether in packages or stowed loose, of any kind or nature whatever."

There is nothing in this language to indicate that articles whose importation is prohibited are not to be included. Indeed, it seems evident that they are included within the letter of the statute which includes all merchandise of every kind whatsoever, and makes no exceptions. It should be observed also that the manifest must contain an account of the sea stores on board the vessel, although such articles are not merchandise, are not imported, and are not subject to duties.

It is submitted that articles whose importation into this country is prohibited are within the letter

of sections 2806, 2807, and 2809, Revised Statutes, and must be included in the manifest as prescribed by those sections unless some strong reason exists to take them out of the spirit of the statute, so that to apply the statute to them would work an absurdity or an injustice.

It is to be observed that the manifest is prescribed by the statutes for the information and use of the officers of the customs. If the duties of such officers were confined solely to the collection of revenues upon importations, there would be great force in the argument that to require the manifest to include prohibited articles would be an injustice and an absurdity. The duties of customs officers, however, are not so limited. In fact, they are the general guardians and custodians of the boundary lines of this country, and it is part of their duty to protect those boundaries from transportation across them of any articles brought in in a manner prohibited by law, no matter whether the illegality consist in a violation of the customs laws or not. This can be clearly seen from the fact that sections 4197, 4198, 4199, and 4200 of the Revised Statutes expressly require manifests of outward bound cargoes. Evidently this requirement can have nothing to do with the collection of customs duties and shows clearly that Congress intended that the customs officers should have complete information for all purposes of every article of merchandise contained in vessels coming to or going from this country.

Consequently this has been in effect the holdings of the courts. In *United States* v. *50 Waltham Watch Movements*, 139 Fed. 291, 299, 300, it was held that goods which were not dutiable must, nevertheless, be declared to the customs officers. The same rulings were in effect made in *United States* v. *Burnham*, 1 Mason 57, 63, in *Jackson* v. *United States*, 4 Mason 186, 190; and in *United States* v. *20 Cases of Matches*, 2 Biss. 47, 50, it was held that a permit was necessary for unloading goods transported from one place in the United States to another but through a foreign country, although the goods were not subject to duty. In *Goldman* v. *United States*, 263 Fed. 340, 343, the court said, in making a similar ruling to the effect that nondutiable goods, nevertheless, could not be unladen without a permit:

> We think section 3082 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise without paying and with the intent to avoid paying the duty on it. The proper administration of the custom laws requires that it be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regulations relating to the introduction of merchandise into the country, other than the ultimate one requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction. It is necessary not only to establish them, but to make disobedience of them criminal.

An even more direct authority is the case of *Daigle* v. *United States*, 237 Fed. 159, 163, 165, referred to above, where it was held that section 3100, Revised Statutes, which provides that all goods imported into the United States from any contiguous foreign country shall be unladen in the presence of and be inspected by an officer in the customs applied to articles whose importation into this country was prohibited. It seems impossible to distinguish between the requirement of a manifest under section 2809, Revised Statutes, and the requirement of inspection under section 3100, Revised Statutes.

But the Government relies mostly on this phase of the case, as well as on the other phases of it, on the decision of this court in *Harford* v. *United States*, 8 Cranch 109, referred to above. In that case it was held that articles whose importation was prohibited were subject to the provisions of the customs laws prohibiting an unloading without a permit. Every reason which can be urged against the requirement of a manifest as to prohibited articles could be equally well used against the requirement of a permit for unloading. In the latter case it could be equally well said that the master could not be expected to ask a permit to unload goods whose importation was prohibited, and that to require him to do so would be to require him to convict himself of an offense. Nevertheless, this court held that the requirement was necessary in the case of prohibited articles as in the case of other articles for the reason that the customs officers were entitled to full information in regard to

all articles brought into this country as a matter of fact whatever their nature might be, or whether their importation was permitted or prohibited.

It is suggested, as it was suggested above in regard to the other two points, that the decision of the courts below in the case at bar has, when analyzed, a much broader scope than appears upon its face. It is difficult to see why, if the manifest be of no importance as to prohibited articles, it is not equally of no importance in regard to articles imported into this country without the payment of duties which have legally accrued upon them. Suppose that the defendant, in the case at bar, instead of intending to bring into this country for sale prohibited articles, intended to smuggle in articles whose importation was permitted, without the payment of the duty thereon. It would seem that in the latter case, just as much as in the former, he would have no inclination to manifest the articles, and, if he did manifest them, his very act of so doing would tend to convict him of the crime of smuggling. If, therefore, it be unnecessary for him to manifest prohibited articles, it is difficult to see why it should be necessary for him to manifest articles which he intends to smuggle into this country. Yet, of course, his duty to manifest in the latter case is entirely clear and would, no doubt, be admitted by everyone. The argument on the other side appears to be that, since the manifest is required for the purpose of preventing the importation into this country contrary to law of merchandise, therefore the manifest should only include those

articles whose importation is intended to be lawful. This view appears to be a complete *non sequitur*. The object of section 2809 is to penalize the bringing in of articles to this country contrary to law by providing that, if they do not appear upon the manifest, they shall be forfeited and the master of the vessel shall pay a penalty. It is their absence from the manifest which is important, not their presence on it. The duty to manifest everything is placed upon the master, and the dereliction of that duty is made punishable, no matter that it is inconceivable that the master, under the circumstances, would perform the duty.

In the case at bar, of course, the master knew of the presence of the opium on board of his vessel, and could therefore very easily have listed it on the manifest. Cases, however, must frequently arise where articles whose importation is prohibited are concealed upon the vessel in such a way as to make it difficult, if not impossible, for the master to include them in the manifest. Nevertheless, it has been held that the master is not excused by such facts, that it is still his duty to enter such articles on the manifest, and that he may be liable to a penalty for failure to place them upon the manifest, although he did not know of their existence on the vessel. See *The Missouri*, 9 Blatch. 433, 436; *The Queen*, 11 Blatch. 416, 418; *Ten Thousand Cigars*, 2 Curtis 436, 438. This latter case is a decision of Mr. Justice Curtis on the circuit. It appeared that there was no bill of lading for the goods in question nor any invoice thereof.

Mr. Justice Curtis held, nevertheless, that a manifest signed by the master was necessary.

Before closing this branch of the subject attention should be called to section 8 of the act of January 17, 1914 c. 9, 38 Stat. 277. That section provides that whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections 2806 and 2807 of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section 2809 of the Revised Statutes. This section would appear to be a egislative declaration that, at any rate in so far as opium prepared for smoking is concerned, it falls within the provisions of section 2809, for the object of section 8 of the act of January 17, 1914 c. 9, is clearly to add to the penalty, which Congress believed to exist already under section 2809, Revised Statutes, a lien upon the boat to give additional security for the penalty. The view of Judge Cushman of the district court that the language of section 8 of the act of January 17, 1914 c. 9, refers only to medicinal opium seems to be entirely impossible. Smoking opium is, of course, a derivative of opium, it is the article dealt with in the act of January 17, 1914 c. 9, and it is the article which naturally Congress would have made such a provision in regard to. While, of course, the fact that Congress thought that section 2809, Revised Statutes, covered

smoking opium and other prohibited articles is not at all conclusive as to the proper construction of that statute, nevertheless it falls in with the other reasoning and authorities quoted above to the same effect.

II.

The fact that the importation of the articles in question is prohibited does not destroy absolutely their value so as to make the application of Section 2809, R. S., to them impossible.

Judge Cushman in the district court held, in the case at bar, that 2809, Revised Statutes, could not be applied to the present case because opium had no value, being an article which was absolutely contraband and whose sale, therefore, was forbidden. The majority of the Court of Appeals did not find it necessary to pass upon this point, but Judge Hunt in dissenting felt obliged to consider it and held that opium did have a value, and that the value in the present case was established by the admissions of the defendant as to what he paid for the opium. It would seem that this decision of Judge Hunt's is correct. The fact that an article is prohibited from commerce would destroy its value if every person obeyed the law. This court, however, is aware that such an ideal condition does not exist and that, in fact, the law is broken in regard to some articles not infrequently. Where there is an illicit business in the article, the article has necessarily a value which can be determined by inquiry into the price paid for it in the for-

bidden market. That is the case with opium, which has a well established value in the places where it can be bought in contravention of law.

CONCLUSION.

The judgment of the court below should be reversed.

JAMES M. BECK,
Solicitor General.

WILLIAM C. HERRON,
Attorney.

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1

SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA, Petitioner, *against* WESLEY L. SISCHO, Respondent.	Motion for Leave to Intervene as *Amicus Curiae*.

2

Now comes Cletus Keating, counsel for John Reed, the defendant respondent in the case of the United States of America, plaintiff, against John Reed, defendant, 274 Fed. 724, now on appeal to the United States Circuit Court of Appeals for the Second Circuit, and prays leave of Court to intervene in the above entitled cause as *amicus curiae*, and as such *amicus curiae* upon the hearing of this cause, to submit a brief in support of respondent and to take part in the oral argument of the cause.

3

Dated, January 25, 1922.

CLETUS KEATING,
Counsel for John Reed,
No. 27 William Street,
New York City.

4

SUPREME COURT OF THE UNITED STATES.

UNITED STATES OF AMERICA, Petitioner, *against* WESLEY L. SISCHO, Respondent.	Petition in Support of Motion.

5

Now comes Cletus Keating, counsel for John Reed, defendant respondent in the case of the United States of America, plaintiff, against John Reed, defendant, intervening as *amicus curiae,* and represents to this Honorable Court:

I. That on or about the 20th day of January, 1921, the United States of America by the United States Attorney for the Eastern District of New York, filed a complaint in the District Court for the Eastern District of New York, against John Reed.

6

II. The complaint set forth two causes of action:

1. That on or about January 4, 1921, while the defendant was master of the Steamship *Royal Prince* "certain merchandise", to wit, thirteen cans of smoking opium, was brought into the United States by the said steamship from Rotterdam, Holland; that the said thirteen cans of smoking opium were not included in nor described in the manifest; that the value of the said merchan-

dise was $650; and that by virtue of the provisions of section 2809 of the Revised Statutes, defendant is liable to a penalty equal to the value of the merchandise, to wit, $650. 7

2. That on or about January 4, 1921, by reason of the foregoing, the defendant was required by virtue of Section 2872 R. S. to obtain and have a permit from the Collector of Customs for the Tenth District of New York, to unload or deliver any merchandise brought in on any vessel from a foreign port; that the said defendant did on or about January 4, 1921, unload and deliver from the steamship *Royal Prince* certain merchandise, to wit, thirteen cans of smoking opium which was 8 brought into the Port of New York by the steamship *Royal Prince* from a foreign port, without having a permit from the Collector of Customs for the Tenth District of New York for such unloading and delivery; that by reason of the foregoing facts and by virtue of section 2873 of the Revised Statutes, the defendant became liable to a penalty of $400.

III. Defendant filed a demurrer to both causes of action on the ground that the complaint did not state facts sufficient to constitute causes of action. The demurrer was sustained by Judge Chatfield and final judg- 9 ment was entered against the plaintiff and the complaint dismissed.

IV. Plaintiff sued out a writ of error to the United States Circuit Court of Appeals for the Second Circuit and the case duly came on to be argued on January 18th and 19th, 1922.

10 V. On January 24, 1922, Honorable Charles Merrill Hough, Circuit Judge, addressed a letter to the United States Attorney for the Eastern District of New York and to Cletus Keating, advising that the Circuit Court of Appeals for the Second Circuit had concluded, after examination of the record, to defer decision until after the Supreme Court had decided the *Sischo* case.

VI. The same questions of law involved in the *Sischo* case are involved in the *John Reed* case.

11 VII. The questions involved in this cause are of great importance to shipping interests, by reason of the fact that the United States of America is seeking to punish the masters of ships for failing to do something under one law, for the doing of which they would be punished under another law.

VIII. The petitioner respectfully requests leave of Court to intervene as *amicus curiae* and to submit a brief in support of respondent, and for leave to take part in the oral argument of the cause.

12 Dated, January 25, 1922.

CLETUS KEATING,
Counsel for John Reed,
27 William Street,
New York City.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, petitioner, *v.* WESLEY L. SISCHO. } No. 76.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

I.

THE WORD "MERCHANDISE" IN SECTIONS 2806, 2807, AND 2809 OF THE REVISED STATUTES INCLUDES ARTICLES THE IMPORTATION OF WHICH IS PROHIBITED, FOR THE WORDS "CAPABLE OF BEING IMPORTED" IN SECTION 2766 INCLUDE ILLEGAL AS WELL AS LEGAL IMPORTATION.

The word "import" means to bring into the United States, and is defined by the Standard Dictionary as follows:

> To bring from a foreign country or state into one's own country or state; introduce from abroad, especially commercially; opposed to *export;* as, to *import* woolen goods; to *import* labor.

In the Revised Statutes and in the Act prohibiting the importation of opium, the word "import" is used as synonymous with "bring into."

Section 3280, Revised Statutes, provides that if any person shall fraudulently or knowingly "import or bring into the United States" "any merchandise, contrary to law, or shall receive, conceal, buy, sell" or "facilitate the transportation," etc., of "such merchandise after importation, knowing same to have been imported contrary to law," etc. It is apparent that the words "importation" and "imported" mean the same as the other words, "import or bring into."

The Act of January 17, 1914, the Act under consideration, after making it unlawful to "import" opium, in section 2, makes it an offense to receive, conceal, buy, sell or facilitate the transportation or concealment or sale of such opium "after importation, knowing the same to have been imported contrary to law." Here the words "import" and "importation" clearly mean "bringing in."

In the following cases it has been held that the word "importation" means bringing into the United States, irrespective of whether the bringing was lawful or unlawful:

Feathers of Wild Birds v. *United States*, 267 Fed. 964. (Under R. S. 3082.)

Daigle v. *United States*, 237 Fed. 818. (R. S. 3100.)

Harford v. *United States*, 8 Cranch 109.

Goldman v. *United States*, 263 Fed. 340.

The Schooner Boston, 1 Gallison 239, Fed. Cas. No. 1670.

In the *Goldman Case* it was held that Section 3082 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise with intent to avoid paying duty. The court said:

> The proper administration of the custom laws requires that it be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regulations relating to the introduction of merchandise into the country, other than the ultimate one of requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction. It is necessary not only to establish them but to make disobedience of them criminal. This Congress accomplished through the enactment of section 3082, the effect of which, as we construe it, is to punish criminally and by forfeiture the bringing into the United States of any merchandise, whether dutiable or nondutiable, contrary to law, and the receiving and buying of it knowing it to have been brought in contrary to law. "Contrary to law" we construe to mean to be in violation of any regulation, relating to its introduction, established by law (other than section 3082 itself) and made punishable when disobeyed. *Keck* v. *U. S.*, 172 U. S. 434–437, 19 Sup. Ct. 254, 43 L. Ed. 505; *One Pearl Chain* v. *U. S.*, 123 Fed. 371, 59 C. C. A. 499; *Estes* v. *U. S.*, 227 Fed. 818, 142 C. C. A. 342.

It is obvious that the expression "may include goods, wares, and chattels of every description capable of being imported" has a different meaning from that which would be implied in the expression "shall include *only* goods, wares, and chattels capable of being imported or capable of being *lawfully* imported." The same method of expression is used in the following Section 2767, providing that the word "port" "may" include any place from which merchandise "can be shipped for importation." Surely it would not be held that the words "can be shipped for importation" meant "can lawfully be shipped for importation." If the word "imported" means "brought in," whether lawfully or unlawfully, then "merchandise" as defined in Section 2766 includes goods capable of being brought in or imported contrary to law.

II.

THE WORD "MERCHANDISE" INCLUDES ARTICLES THE IMPORTATION OF WHICH IS ILLEGAL.

United States v. *Thomas*, 4 Benedict 370.
United States v. *Claflin*, 13 Blatch. 178.
United States v. *Kee Ho*, 33 Fed. 333.
The Ivor Heath, 275 Fed. 67.

It also includes articles brought in as passengers' baggage not intended for sale.

United States v. *Chesbrough*, 176 Fed. 778.
Von Cotzhausen v. *Nazro*, 15 Fed. 891.

III.

CAN CONGRESS HAVE INTENDED THAT PROHIBITED ARTICLES SHOULD BE MANIFESTED?

Congress has distinctly said so in the Tariff Act of 1922.

The Tariff Act of 1922, Section 401, defines "merchandise" as "goods, wares, and chattels of every description and includes merchandise, the importation of which is prohibited."

Furthermore, the very Act under discussion, that of January 17, 1914, Section 8, seems to provide in so many words that the opium shall be manifested, when it says that "Whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes," etc.

It is urged that these various provisions are for the exclusive protection of the revenue. We contend that the purpose is broader. It is for the general protection of the frontier of the country. That the provisions relating to manifests are not solely for the protection of the revenue is obvious from the fact that Sections 4197 to 5200, inclusive, require manifests of outbound cargoes, and Section 3116 requires manifests for vessels in the coast trade departing from any port to one in another collection district.

But it would seem that the provision might have, even in the case of opium whose importation is prohibited, a direct relation to the revenue, for, on January 17, 1914, another Act of Congress became a law, 38 Stat. 277, *c.* 10, entitled "An Act regulating the manufacture of smoking opium within the United States and for other purposes." This Act imposed an internal-revenue tax of $300 per pound upon all opium manufactured in the United States for smoking purposes and required every manufacturer to comply with regulations to be approved by the Secretary of the Treasury and to give a bond for not less than $100,000, and also made provisions for stamping such opium to indicate the payment of the tax.

The amount of opium imported unlawfully by Sischo is alleged to have been 100 five-tael tins of opium. This would amount to approximately 40 pounds, which amount, if manufactured in the United States, would have entitled the Government to about $12,000 in taxes.

It is urged that it is incredible to expect a captain to manifest articles whose importation is illegal and thereby furnish the evidence of his own crime.

This is no more unreasonable, however, than it is to expect him to manifest articles which he intends to smuggle, or to obtain a permit to land such articles.

This provision may well be considered, however, as affording protection to an innocent captain as well as imposing penalties upon the guilty. An

honest captain will have no difficulty in complying with it. Section 2810 of the Revised Statutes provides that if the error was due to mistake no penalty or forfeiture should be incurred, and under the provision of Section 4 of the Act of January 17, 1914, it is made the duty of any person who has knowledge of the presence on any vessel of smoking opium to report the same to the proper officer under severe penalties, and it is also provided that the master shall not be liable if he shall satisfy the jury that he had no knowledge and used due diligence to prevent the presence of the articles on his vessel. Should a captain discover that without his knowledge smoking opium had been taken aboard his vessel it would be his duty to list that opium upon his manifest and call the attention of the revenue officers to it at the first opportunity.

If he was innocent of any wilful wrongdoing in taking the opium on board, he would thereby show his innocence and free himself from liability. If he should not take that course, he would be justly liable to a penalty for violation of the section. It is conceivable that he might be in doubt as to whether opium which he had on board was smoking opium, the importation of which was prohibited, or some other variety of opium, the importation of which was lawful. The proper course for him to take would be to describe it upon the manifest, thereby exonerating himself from any charge of concealment, and allow the revenue officers themselves to make the decision as to its character.

A practical illustration of the situation in the case of a law-abiding captain was the subject of an opinion by the Attorney General to the Secretary of the Treasury under the Act of February 9, 1909, which was the original act forbidding importation of smoking opium. In that case a vessel arrived at the port of San Francisco, having on board a package of smoking opium duly shown by the manifest. The ultimate destination of the package was a foreign country, and the intention was that the package should be brought into the port of San Francisco and there put aboard another vessel to be borne to its foreign destination. This situation was reported to the Secretary of the Treasury, and he asked the opinion of the Attorney General whether such transfer could be allowed.

Mr. Wickersham advised that the transfer could lawfully be made (27 Ops. A. G. 440). The only bearing which this case has is that it shows the reasonableness of the requirement that articles of this questionable character should be listed upon the manifest by all those who desire to observe the law. If the captain of that vessel had adopted the course of concealing the opium and attempting to transfer it to the other vessel without the knowledge of the officers of the United States, he would have been in the same situation that Sischo is to-day. We can see no force in the argument that Congress did not intend a law to require something which, of course, the deliberate lawbreaker would not be expected to do.

IV.

THE OPIUM WAS NOT WITHOUT VALUE.

It cost Sischo $6,400.

Its manufacture in the United States was not unlawful. 38 Stat. 277.

The sale of smoking opium does not seem to have been unlawful under the Act of December 17, 1914. 38 Stat. 785.

It could be used under the Revenue Act of 1918. 40 Stat. 1057.

Section 1008 of the Revenue Act of 1918 (February 24, 1919) provides:

> That all opium, its salts, derivatives, and compounds, and coca leaves, salts, derivatives, and compounds thereof, which may now be under seizure or which may hereafter be seized by the United States Government from any person or persons charged with any violation of the Act of October 1, 1890, as amended by the Acts of March 3, 1897, February 9, 1909, and January 17, 1914, or the Act of December 17, 1914, shall upon conviction of the person or persons from which seized be confiscated by and forfeited to the United States, and the Secretary is hereby authorized to deliver for medical or scientific purposes to any department, bureau, or other agency of the United States Government, upon proper application therefor under such regulation as may be prescribed by the Commissioner, with the approval of the Secretary, any of the drugs so seized, confiscated, and forfeited to the United States.

> The provisions of this section shall also apply to any of the aforesaid drugs seized or coming into the possession of the United States in the enforcement of any of the above-mentioned acts, where the owner or owners thereof are unknown. None of the aforesaid drugs coming into possession of the United States under the operation of said acts, or the provisions of this section, shall be destroyed without certification by a committee appointed by the Commissioner, with the approval of the Secretary, that they are of no value for medical or scientific purposes.

As Judge Hunt said, in his dissenting opinion (p. 37, 38):

> With respect to the value of the smoking opium, the rulings of the Treasury Department provide that for the purpose of assessing the fine under section 2809, supra, the value of the prohibited opium is the foreign value. Treas. Dec. No. 32083, December, 1911. In the present instance the value of $6,400 was fixed by the custom officers as based upon the statements of the defendant below, who said that he had paid that sum for the opium in British Columbia. In a case of this character this was sufficient evidence of the value.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

APRIL, 1923.

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UNITED STATES v. SISCHO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 76. Reargued April 23, 1923.—Decided May 7, 1923.

1. The purpose of requiring a ship's manifest is not merely the collection of duties but also to inform the Government whether forbidden things are being imported. P. 167.
2. Rev. Stats. § 2766, providing that "the word 'merchandise,' as used in this Title, may include goods, wares, and chattels of every description capable of being imported," does not mean such only as are capable of being legally imported, or make that restriction upon the term as used in prior statutes. P. 168.
3. The Act of January 17, 1914, which forbids the importation of smoking opium, and provides that wherever there shall be found on an incoming vessel opium, or its preparations or derivatives, not shown upon her manifest as provided by Rev. Stats. §§ 2806 and 2807, the vessel shall be liable to the penalty and forfeiture prescribed by § 2809, intends that smoking opium must be included in the manifest, and shows that, from the date of the act at least, the definition of merchandise in Rev. Stats. § 2766, *supra*, must be taken as including forbidden opium. *Id.*
4. Rev. Stats., § 2809, providing that if any merchandise shall be brought into the United States in any vessel from a foreign port, which is not included or described in the manifest, the master shall be liable to a penalty equal to the value of such merchandise, applies to smoking opium, the importation of which has been forbidden. *Id.*
5. The foreign value of such opium was properly taken for the purpose of measuring the penalty in this case. P. 169.

270 Fed. 958, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court for the appellee in an action by the United States to recover a penalty.[1]

[1] The case was first argued on October 10, 11, 1922, and, on October 16, 1922, the judgment was affirmed with costs by an equally divided court. 260 U. S. 697. On November 13, 1922, a petition for rehearing was granted and the cause restored to the docket for hearing before a full bench. 260 U. S. 701.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. John M. Woolsey, with whom *Mr. Cletus Keating* and *Mr. Harry D. Thirkield* were on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the United States to recover a penalty of $6,400 from the defendant for bringing into this country one hundred five-tael tins of opium prepared for smoking purposes without including the same in the ship's manifest. The defendant was master of the vessel in which the opium was imported and was charged by the Collector of Customs with a liability for the above sum, that being the price paid by the defendant for the goods. By Rev. Stats. § 2809, "If any merchandise is brought into the United States in any vessel whatever from any foreign port . . . which shall not be included or described in the manifest . . . the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited." The District Court, sitting without a jury, held that opium prepared for smoking purposes was not merchandise within the meaning of § 2809, and that being outlawed by the statutes it had no value; and gave judgment for the defendant. 262 Fed. 1001. The judgment was affirmed by the Circuit Court of Appeals, one Judge dissenting, on the former ground. 270 Fed. 958. A writ of certiorari was granted by this Court. 256 U. S. 688. It was stated below that the defendant had been convicted of smuggling; but the

record does not disclose the fact, if material, and nothing turns upon it. The points mentioned are the only ones to be discussed.

The collection of duties is not the only purpose of a manifest, as is shown by the requirement of one for outward bound cargoes and from vessels in the coasting trade bound for a port in another collection district, Rev. Stats. §§ 4197, 3116, and more clearly by the plain reason of the thing. A Government wants to know, without being put to a search, what articles are brought into the country, and to make up its own mind not only what duties it will demand but whether it will allow the goods to enter at all. It would seem strange if it should except from the manifest demanded those things about which it has the greatest need to be informed—if in that one case it should take the chance of being able to find what it forbids to come in, without requiring the master to tell what he knows. It would seem doubly strange when at the same time it required any other person who had knowledge that the forbidden article was on the vessel to report the fact to the master. Act of January 17, 1914, c. 9, § 4, 38 Stat. 275, 276. It is not an answer to say that if the master knows that he has contraband goods on board he is subject to a penalty for that and probably will lie. The law naturally, one would think, would put the screws on to make him tell the truth, and in that way diminish the chance of his carrying contraband and help him to show his innocence if he has made a mistake. *Harford* v. *United States*, 8 Cranch, 109. We are of opinion that this policy, which has been expressed in terms in later statutes, (Act of May 26, 1922, c. 202, § 3, 42 Stat. 596, 598; Tariff Act of September 21, 1922, c. 356, §§ 401(c), 431, 584, 42 Stat. 858, 948, 950, 980;) governs also in the statutes to be construed here. There is less contradiction between the requirement of the manifest and the prohibition of the import than there is between such a

prohibition and a tax. *United States* v. *Stafoff*, 260 U. S. 477.

The main foundation of the decision below is Rev. Stats. § 2766: "The word 'merchandise,' as used in this Title [the Title including § 2809 upon which this suit is based,] may include goods, wares, and chattels of every description capable of being imported." It is argued that this is a definition; that "capable of being imported" must be taken to mean capable of being imported lawfully as otherwise the phrase hardly would do more than exclude chattels real, and would want the poignant significance attributed to every word of legislation; and that therefore the merchandise to be included in the manifest does not embrace opium for smoking which the law has done all it can to exclude. Act of January 17, 1914, c. 9, 38 Stat. 275. Yet this very Act of 1914 provides that whenever there shall be found upon a vessel arriving at any port of the United States opium "or any preparations or derivatives thereof" "which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section twenty-eight hundred and nine of the Revised Statutes." We see no adequate reason for not taking these words in their natural sense as including smoking opium and as meaning that it must be included in the manifest, or for limiting them to forfeiture of the vessel. We rather should read them as showing that, at least for the future and at least so far as derivatives from opium are concerned, the language quoted from Rev. Stats. § 2766, was also to be taken in its natural sense as meaning physically capable of being imported.

The language under consideration was an insertion in the Revised Statutes. That volume was primarily a codification of the general statutes then in force and is

not lightly to be read as making a change, although of course it may do so. The words on their face indicate rather an extension than a restriction. "May include" seems to point to the removal of a doubt as to whether previously "merchandise" might include all that is mentioned. It is a most unnatural way of saying that henceforth it shall not include something that otherwise might have been included. To give it the latter meaning we have again to read "capable of being imported" in an artificial sense instead of taking the phrase simply for what it says to a plain mind. The only objection to reading it in the natural way is that it is thought to add nothing to what was contained in "goods, wares, and chattels of every description." But there is no canon against making explicit what is implied and adding a little emphasis to the endeavors to make the proposition broad. The doubts that have been felt show that the endeavor was not very successful, but we believe that it was made. There can be little doubt that before the insertion of § 2766 goods that could not be imported lawfully were merchandise within the meaning of the statutes. It was held in *Harford* v. *United States*, 8 Cranch, 109, that the unlading of such goods without a permit was an offence subjecting them to forfeiture, upon reasoning that applies to the requirement that they should be entered on the manifest, with equal force.

What we have said sufficiently disposes of the suggestion that the requirement was repealed by the opium act that we have cited. That is merely saying in another way that a manifest is not necessary for goods forbidden to enter the country. All that remains is the suggestion that smoking opium has no value. But assuming it to be established that the statutes require the manifest to disclose prohibited articles the penalty imposed implies that such articles may have value and does not require the Courts to set up a technical rule in face of the plain truth.

So the provision that smoking opium shall be forfeited implies that however evil it may be it has an owner. Act of January 17, 1914, c. 9, § 4, 38 Stat. 275. Act of May 26, 1922, c. 202, § 3, 42 Stat. 596, 598. In the circumstances we see no objection to taking the foreign value as evidence, in accordance with the rulings of the Treasury Department. Treas. Dec. No. 32083, December, 1911. 21 T. D. 687.

Judgment reversed.

BIANCHI ET AL. v. MORALES ET AL.